No. 80-1663

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, and T. W. GLEASON, Individually and as he is President of International Longshoremen's Association, AFL-CIO and H. R. HASSELGREN, Individually and as he is Secretary-Treasurer of International Longshoremen's Association, AFL-CIO and N. J. BOWERS, Individually and as he is Executive Vice President of International Longshoremen's Association, AFL-CIO and F. R. FIELD, JR., Individually and as he is General Organizer of International Longshoremen's Association, AFL-CIO and A. SCOTTO, Individually and as he is Regional Director of International Longshoremen's Association, AFL-CIO and J. T. MOOCK, Individually and as he is First Vice President of International Longshoremen's Association, AFL-CIO and R. A. MASSEY, Individually and as he is Second Vice President of International Longshoremen's Association, AFL-CIO and G. W. Dixon, Individually and as he is Third Vice President of International Longshoremen's Association, AFL-CIO and W. P. LYNCH, Individually and as he is Fourth Vice President of International Longshoremen's Association, AFL-CIO,

Petitioners,

v.

ALLIED INTERNATIONAL, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

1. Whether a union's refusal to handle goods imported from the Soviet Union, prompted solely by that nation's military aggression, is a dispute "in commerce" so as to be within the purview of the National Labor Relations Act?

2. Whether under the doctrine enunciated in *American Radio Association v. Mobile Steamship Association, Inc.*, 419 U.S. 215 (1974), the local effects of a union's action pursuant to an underlying dispute which is recognized not to be "in commerce" may be bifurcated so as to be subject to the National Labor Relations Act?

3. Whether longshoremen's mere refusal, for conscientious and political reasons, to perform services for an aggressor nation may be held to violate the secondary boycott prohibition of NLRA §8(b)(4), 29 U.S.C. §158(b)(4), where it is unaccompanied by any threats, pressure or reprisals against any person who continues to do business with the aggressor?

4. Under the holding in *NLRB* v. *Retail Store Employees Union Local 1001*, —— U.S. ——, 100 S. Ct. 2372 (1980), may an unlawful object violative of NLRA §8(b)(4) be inferred solely and exclusively from effects of a union's action which are equally referable to a lawful purpose?

5. Is action of a union which supports and endorses the desire of its members to refrain from participation in unconscionable activity protected by the First Amendment?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. .....

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et. al.*,

Petitioners,

v.

ALLIED INTERNATIONAL, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners, International Longshoremen's Association, AFL-CIO ("ILA"), Local 799, ILA, and their respective officers respectfully pray that a writ of certiorari issue to review the opinion, order and judgment of the United States Court of Appeals for the First Circuit in this case.

Opinions Below

The opinion of the court of appeals is not yet reported. It is reproduced herein as Appendix A. The opinion rendered by the district court is reported officially at 492 F. Supp. 334 (D. Mass. 1980).

Jurisdiction

The judgment of the court of appeals was entered on January 6, 1981. Petitioners invoke the Court's jurisdiction under 28 U.S.C. §1254(1).

Statute Involved

The relevant statutory provisions are as follows:

1. Section 8(b) of the National Labor Relations Act, 29 U.S.C. §158(b) provides in pertinent part:

> It shall be an unfair labor practice for a labor organization or its agents—
>
> . . . .
>
> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
>
> . . . .
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, . . . any primary strike or primary picketing; . . .

2. Section 303 of the Labor-Management Relations Act, 29 U.S.C. §187, provides in pertinent part:

> (a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 158(b)(4) of this title.
>
> (b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) of this section may sue therefor in any district court of the United States . . . and shall recover the damages by him sustained and the cost of the suit.

Statement of the Case

On January 9, 1980, Thomas W. Gleason, President of Petitioner ILA, announced that the union had ordered immediate suspension in handling by longshoremen of Russian cargo and Russian ships in all ILA ports from Maine to Texas and Puerto Rico. The action was in response to the "overwhelming demands of the rank and file members of the Union," whose will was to refuse to service the Soviets on account of the invasion of Afghanistan in December 1980 and the concomitant threat to world peace.

The present case is one of many which arose from the ILA action. Respondent Allied International, Inc. ("Allied") is an importer, engaged in the purchase and sale of wood products from the Soviet Union. It utilizes the services of Waterman Steamship Lines ("Waterman"), an American common carrier by sea. In the port of Boston, Waterman uses the services of John T. Clark & Son of Boston, Inc. ("Clark"), a stevedoring company, to dock, load and unload its vessels. Clark employs longshoremen pursuant to the collective bargaining agreement between

the Boston Shipping Association and Petitioners ILA and Local 799. The initial source of longshoremen for Clark's operation is a hiring hall operated by Local 799. If ILA labor is unavailable, the collective bargaining agreement authorizes the use of non-union labor.

On January 9, 1980, Waterman's ship, the *WALTON*, was in Boston unloading part of a shipment Allied had purchased from the Soviet Union. Upon hearing of the ILA's announcement, Allied contacted President Gleason directly and was informed that ILA members would complete unloading the *WALTON*'s cargo at Boston, but would not unload that ship, nor any Soviet cargo, in any other port. In response, Waterman cancelled the *WALTON*'s scheduled calls and unloaded all Allied's cargo in Boston. Rather than pressing Clark to seek non-ILA labor, Waterman and Allied unilaterally restricted the cargo then being loaded aboard another ship in Leningrad to one-third its scheduled size, cancelled its delivery to scheduled United States ports, and unloaded the cargo in Montreal. In addition, Waterman repudiated its agreement to transport Allied's wood products aboard another vessel. Thereafter, the ILA and Local 799 representatives again informed Allied that no ILA members would unload any cargo originating in the U.S.S.R.

On March 31, 1980, Allied filed a complaint in the United States District Court for the District of Massachusetts against petitioners herein seeking injunctive relief and damages under LMRA §303 for an alleged secondary boycott in violation of NLRA §8(b)(4), and alleging violations of the Sherman and Clayton antitrust acts, as well as a common law admiralty tort. On June 17, 1980, the district court granted petitioners' motion to dismiss the complaint for failure to state a claim on which relief could be granted.[1]

[1] Allied also brought unfair labor practice charges against petitioners in Region 1 of the National Labor Relations Board based on

On January 6, 1981, a divided panel of the First Circuit reversed the dismissal of respondent's §303 count and remanded for further consideration of Allied's prayer for damages and injunctive relief. The majority held that the union's action was "in commerce" so as to be within the jurisdiction of the NLRA; that an unlawful object could be inferred solely from the foreseeable effects of the union members' refusal to service the Soviets despite the lack of any allegations of threats, coercion or reprisals against any person; and that the common law admiralty tort claim was preempted. Senior Circuit Judge Aldrich dissented with respect to the jurisdictional holding but would have sustained the common law admiralty count, since there was no jurisdiction under the federal labor law. The panel agreed that the union's action was not protected by the First Amendment and that the antitrust count failed to state a claim. Petitioners now seek a writ of certiorari from this Court to review the First Circuit's decision sustaining respondent's §303 claim.

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the same acts which form the predicate for this case. The instant action and the Regional Director's application for an injunction pursuant to NLRA §10(l), 29 U.S.C. §160(l), were consolidated in the district court. The district court denied an injunction on the ground that the Regional Director had no reasonable cause to believe that the mere refusal to handle Soviet goods violated the Act. *Walsh* v. *ILA*, 488 F. Supp. 524 (D. Mass. 1980), *vacated and remanded with instructions to dismiss on the ground of res judicata*, 630 F.2d 864 (1st Cir. 1980). In dismissing respondent's §303 count in this case, the district court applied its prior holding in *Walsh* as the law of the consolidated case. 492 F. Supp. at 336.

On appeal of the *Walsh* case, the First Circuit held that the district court had erred in failing to give res judicata or collateral estoppel effect to a prior decision, *Baldovin* v. *ILA*, No. H-80-259 (S.D. Tex. Feb. 15, 1980), *aff'd*, 626 F.2d 445 (5th Cir. 1980), which had denied a §10(l) injunction on the ground that the ILA's action was not "in commerce" so as to be subject to the NLRA. The First Circuit remanded with instructions to dismiss the §10(l) petition on this ground. 630 F.2d at 875.

REASONS FOR GRANTING THE WRIT

1. The Decision of the Court Below Concerning an Important Question of Federal Jurisdiction Directly Conflicts With a Prior Decision of This Court

The First Circuit's decision with respect to the jurisdiction of the National Labor Relations Act directly conflicts with the decision of this Court in *American Radio Association* v. *Mobile Steamship Association*, 419 U.S. 215 (1974) *("Mobile")*. It is a classic example of "bifurcating" the domestic effects and the underlying foreign dispute so as to make the former subject to the Act although the latter is not.

In a series of cases, this Court has articulated the jurisdiction of the national labor act with respect to disputes between American unions and foreign entities.[2] In *Windward Shipping (London) Ltd. v. American Radio Association*, 415 U.S. 104 (1974) *("Windward")*, an American union picketed a foreign vessel in an American port to protest substandard wages paid to foreign seamen. The Texas Court of Civil Appeals denied an injunction on the ground that state court jurisdiction was preempted by the federal act. This Court reversed, holding that the dispute was not "in commerce" and so not arguably subject to the secondary boycott proscriptions of the Act.[3] The rationale for this holding was principles of comity and the fact that

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[2] *Bens* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Incres Steamship Company* v. *International Maritime Workers Union*, 372 U.S. 24 (1963); *International Longshoremen's Ass'n Local 1416, AFL-CIO* v. *Ariadne Shipping Company*, 397 U.S. 195 (1970).

[3] The Court distinguished its earlier holding in *International Longshoremen's Ass'n Local 1416, AFL-CIO* v. *Ariadne Shipping Company, supra.* 415 U.S. at 112, 114. There, although the dis-

> [v]irtually none of the predictable responses of a foreign shipowner to picketing of this type . . . would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate.
> 415 U.S. at 115.

In *Mobile*, a factually similar case, the Court held that the domestic effects of the union's picketing in response to the foreign dispute did not bring it into domestic commerce so as to subject it to the secondary boycott provisions of the Act. The Court refused to adopt the bifurcated view necessary to bring the domestic consequences within the Act, despite its recognition that such domestic effects must occur and might be

> a *crucial part of the mechanism* by which the maritime operations of the foreign ships were to be affected.
> 419 U.S. at 224 (emphasis supplied).

See also Windward, 415 U.S. at 114.

The First Circuit's decision in the instant case manifestly disregards the holding in *Mobile*. The majority of the First Circuit panel agreed, as has every court,[4] that the underlying dispute here is between the ILA and the U.S.S.R. over a political issue not "in commerce." However, it held that the domestic effects of the ILA action could be separated and made subject to the NLRA because "The *only* labor-related activity in issue has been played out by an all-American cast." (App. A at 13a). The fallacy of

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putants were an American union and a foreign entity, the dispute was over the hiring in United States ports of unionized American labor—something clearly within domestic commerce.

[4] *See Hampton Roads Shipping Ass'n* v. *ILA*, 631 F.2d 282 (4th Cir. 1980); *New Orleans Steamship Ass'n* v. *ILA*, 626 F.2d 455 (5th Cir. 1980), *cert. granted, Jacksonville Bulk Terminals, Inc.* v. *ILA*, No. 80-1045, March 30, 1981.

such labelling is evident from the fact that the same observation could have been made in *Mobile*, where the picketing American unions had no relationship to the foreign entity and where suit was brought by American stevedores whose American longshoremen refused to cross the picket lines.

The conflict between the decision in this case and the *Windward/Mobile* holdings is further evident from the fact that, in the related *Walsh* case, *supra*, the First Circuit had correctly interpreted and followed this Court's earlier rulings. There, the court of appeals,[5] in order to reject a distinction urged by the appellant and to find that the preclusionary rules were applicable, was required to interpret *Windward* and *Mobile*. The court said:

> We think these cases indicate that the question of jurisdiction turns not on the registry of the ships, but on the *nature and location of the underlying dispute.* 630 F.2d at 874 (emphasis supplied).

The court acknowledged that, "the Board could not exercise jurisdiction over a secondary boycott where the *primary dispute was outside its jurisdiction.*" *Id.* at 875 n.13 (emphasis supplied).[6] In the instant case, even while finding that the primary dispute was outside the jurisdiction of the Act, the majority found jurisdiction over the domestic effects.

This Court should grant a writ of certiorari to require compliance by the First Circuit with the jurisdictional limits of the NLRA as previously delineated by the Supreme Court.

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[5] The panel in *Walsh* consisted of the two judges who formed the majority in this case and Chief Judge Coffin.

[6] The jurisdictional basis for an NLRA §8(b)(4) proceeding and for a §303 claim are the same.

2. A Writ of Certiorari Is Necessary to Resolve a Conflict Between Circuits With Respect to an Important Question of Federal Jurisdiction

The First Circuit's resolution of the jurisdictional issue is also in direct conflict with a decision of the Fifth Circuit arising out of the identical ILA conduct. In *Baldovin* v. *ILA*, 626 F.2d 445 (5th Cir. 1980), the Fifth Circuit affirmed the denial of an injunction under NLRA §10(l) to restrain the same ILA conduct in the port of Houston, Texas and reversed the granting of a §10(l) injunction to restrain the ILA in Savannah, Georgia. The Fifth Circuit held that under the *Windward* decision the ILA's dispute with the Soviet Union over the latter's military and foreign policy was not "in commerce" so as to fall under the federal labor act and that under *Mobile* the domestic ramifications could not be bifurcated so as to be subject to the Act. The decision for which review is sought directly conflicts with the latter holding.

The First Circuit's decision also conflicts with the approach of the National Labor Relations Board as to the coverage of the Act. In *National Maritime Union of America (Shippers Stevedoring Co.)*, 245 N.L.R.B. 29 (1979) (*"Shippers Stevedoring"*) the Board held that a union's refusal to service Soviet vessels was not "in commerce."[7] More recently, an administrative law judge ordered dismissal of the secondary boycott charges arising in Houston, Savannah and Boston from the ILA's anti-Soviet action.[8]

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[7] The dispute in *Shippers Stevedoring* was over alleged Soviet violations of certain laws of the United States requiring that 50% of certain cargoes be transported on American flag vessels.

[8] *International Longshoremen's Ass'n, AFL-CIO (Kansas Farm Bureau)* Nos. 22-CC-762-1, 763-1, 764-1; *International Longshoremen's Ass'n, AFL-CIO (Occidental Chemical Company)* Nos. 10-CC-1141-1-4; *International Longshoremen's Ass'n, AFL-CIO (Allied International, Inc.)* No. 1-CC-1753. The charges in No. 1-CC-1753 were brought by respondent herein based on the identical conduct on which its §303 count in this case is predicated.

He held that under *Windward/Mobile* the underlying dispute here is not "in commerce" and the domestic effects may not be made subject to Board jurisdiction. A copy of the administrative law judge's decision is reproduced as Appendix B to this petition. (App. B at 38a *et seq.*).

The conflict among the circuits and the NLRB is over the meaning of prior decisions of this Court and indicates the need for further clarification as to the meaning of those holdings. The division of opinion is further reflected in the lower courts, where two of the three district judges reached the same conclusion as the majority of the First Circuit. Thus, there exists among the courts widespread disagreement as to the important question of the jurisdiction of federal labor law. The national scope and importance of this issue are apparent from the fact that the ILA's refusal to service the Soviets is being carried on in 36 ports from Maine to Texas. Because of the inter-circuit conflict the same activity is governed in different ports by different law with respect to the jurisdiction of the same federal statute. This Court should grant a writ of certiorari to resolve the conflict between the circuits and to clarify the meanings of its prior decisions in this important area.

3. A Writ of Certiorari Should Be Granted to Review Important Issues of National Labor Law Involving a Conflict Between Circuits and the Unwarranted Extension of a Decision by This Court

If there is federal jurisdiction, two important questions of national labor law are presented: (1) whether the union conduct here falls within the secondary boycott proscriptions of the Act and (2) whether the unlawful intent necessary to violate §8(b)(4) may be inferred solely from the effects of the union's action? The First Circuit's affirmative answers to both questions require review by this Court.

The decision below that the union conduct here falls within the secondary boycott prohibition of the Act is in direct conflict with the holding of another court of appeals, *NLRB* v. *ILA, ("Ocean Shipping")*, 332 F.2d 992 (4th Cir. 1964). The panel decision expressly recognized its disagreement with the Fourth Circuit (App. A at 22a). Review by the Supreme Court is required to resolve this conflict.

In holding that a union's unlawful object may be inferred solely from the effects of its action, the First Circuit relied on the decision in *NLRB* v. *Retail Store Employees Union Local 1001*, —— U.S. ——, 100 S. Ct. 2372 (1980). In that case, this Court held that "[p]roduct picketing that reasonably can be expected to threaten neutral parties with ruin or substantial loss" could be held violative of §8(b)(4). 100 S. Ct. at 2377. The decision below gives that ruling an expansive interpretation and extends it into new and unprecedented areas.

Retail Store Employees involved products picketing. There is no question that the union there freely elected to extend its action against its employer by picketing its product at secondary locations. The question was whether the object of this voluntary action was to engage in publicity picketing protected under the doctrine set forth in *NLRB* v. *Fruit and Vegetable Packers Local 760*, 377 U.S. 58 (1964), or to force a neutral to cease doing business with the union's employer in violation of §8(b)(4). This Court held that the unlawful object of the picketing could be inferred from its effects on the neutral party.

In the case at bar the First Circuit extended this holding so as to make it apply to any alleged violation of §8(b)(4). Despite the fact that there were no allegations or evidence of any kind[9] to show that the union had any motive other

[9] The First Circuit acknowledged that the union had not engaged in any threats or coercion and was willing to continue to handle the non-Soviet cargo even of persons who continue to do business with the U.S.S.R. (App. A at 26a).

than to regulate its own conduct so as not to service the Soviets, the First Circuit held that, under *Retail Store Employees,* an object to involve neutrals in the dispute could be inferred from its necessary and foreseeable effect on them (16a-19a). Such an extension of the holding in *Retail Store Employees* is unwarranted and dangerous.

In the area of products picketing, there is always a deliberate choice by the union to engage in the picketing.[10] It is thus appropriate to look to the effects to ascertain the intent. In the case at bar, the involvement of respondents was something quite beyond the power of the union to control. If the union was to pursue a lawful object—i.e., regulate its own conduct vis-à-vis the U.S.S.R.—other parties must be affected. The effects of the union's action were equally referable to both objects. The First Circuit opted for an unlawful interpretation simply by *fiat*—in effect rewriting §8(b)(4) to read "where an *effect* thereof, etc." rather than "where an *object* thereof, etc."

Review by this Court is appropriate before a doctrine enunciated in a particular and specialized context is transformed into a rule of general application amounting to a presumption of guilt.

4. Important First Amendment Issues in This Case Should Be Reviewed by the Supreme Court

The case at bar involves three distinct but interrelated First Amendment rights: (1) the right of the union to

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[10] Both the other cases relied on by the First Circuit also contained this element of deliberate choice by the union to engage in activity beyond what was strictly necessary to its primary dispute. *NLRB* v. *Twin City Carpenters District Council,* 422 F.2d 309 (8th Cir. 1970) was a *"Tree Fruits"* products picketing case. *NLRB* v. *Local 825, International Union of Operating Engineers,* 400 U.S. 297 (1971) involved pressure on the union's admittedly neutral employer with a question of whether the union's objective was to force cessation of doing business or only to force the employer to use its influence on the union's behalf. 400 U.S. at 304.

engage in passive protest as a means of expression; (2) the right of union members in conscience to abstain from participating in what they deem an immoral endeavour[11] and (3) the right of association in which the union as an entity elects to concur and support those members who in conscience elect to abstain.

The First Circuit's holding with respect to the right of expression aspects directly conflicts with the holding of the Court of Appeals for the Fourth Circuit in *Ocean Shipping, supra.* That case involved the ILA's refusal in the 1960's to load ships used in trade with Cuba. Although the Fourth Circuit decided the case on the ground that the NLRB lacked jurisdiction because no labor dispute was involved, the court went on to consider the merits of the unfair labor practice charge alleged. It ruled that a politically-motivated boycott would not violate §8(b)(4) because "if the bare refusal to work in the circumstances shown should be held illegal, the union would be deprived of its right of expression . . . ." 332 F.2d at 997. The decision of the First Circuit for which review is sought is directly *contra.*[12]

In rejecting the union's First Amendment arguments, the First Circuit failed to distinguish between the right of expression, which is reflected in the publicity proviso of NLRA §8(b)(4) itself, and the right of conscientious

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[11] *Cf. Sherbert* v. *Verner,* 374 U.S. 398 (1963).

[12] The First Circuit's justification for permitting the §8(b)(4) charges to curtail First Amendment rights, that the "union and its members have numerous alternative forms of internal 'expression' left to them" (App. A at 22a) is in direct conflict with decisions of this Court that infringement of freedom of expression may not be justified on the ground that alternative means of communication are open. *See, e.g. Schneider* v. *Irvington,* 308 U.S. 147 (1939).

refusal—not as a means of expression but as the end in itself of not aiding an aggressor.[13]

Ultimately, the merits of this case turn on whether the union's action had as its object forcing others to cease doing business with the U.S.S.R. or governing only its own conduct. The latter would be protected by the First Amendment. By holding that the effects on others, standing alone, were sufficient to make out an unlawful object in violation of §8(b)(4) and that secondary boycotts were not within the constitutional protection, the First Circuit deprived union members of any right in conscience to regulate their own behavior vis-à-vis the Soviets. A decision to decline Russian work must, perforce, affect others, whether intended to or not. In essence, the court of appeals held that by virtue of its strategic location in the chain of commerce the union must enjoy fewer rights under the First Amendment than employer organizations or private groups.

This Court should grant certiorari to review the subtle and sensitive First Amendment issues raised in this case.

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[13] Since this case does not involve any picketing, advertising or other publicity, the conscientious motive, rather than free expression, is paramount.

CONCLUSION

For the foregoing reasons, Petitioners pray that a writ of certiorari be issued to review the judgment and decision of the United States Court of Appeals for the First Circuit in this case.

Dated: April 3, 1981

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 80-1425

ALLIED INTERNATIONAL, INC.,

Plaintiff-Appellant,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL.,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Walter Jay Skinner, *U. S. District Judge*]

Before:

ALDRICH, CAMPBELL and BOWNES,

Circuit Judges.

Duane R. Batista, with whom *Danielle DeBenedictis*, and *Nutter, McClennen & Fish* were on brief, for appellant.

Ernest L. Mathews, Jr., with whom *Charles R. Goldburg, Condon & Doyle*, and *Thomas W. Gleason* were on brief, for appellees.

January 6, 1981

Appendix A

CAMPBELL, *Circuit Judge.* This is an appeal from a decision of the district court denying plaintiff-appellant's motion for a preliminary injunction and granting defendants-appellees' motion to dismiss.[1]

The facts are much like those recently before this court in *Walsh* v. *ILA, Local 799*, 630 F.2d 864 (1st Cir. 1980). Allied International, Inc., is an importer of Russian wood products, which has contracted with two agencies of the USSR for the purchase of birch hardwood and plywood. Allied has also contracted (through a third Soviet agency) with Waterman Steamship Co. for the shipment of these wood products to the United States from the USSR. Waterman employs John T. Clark & Son, a stevedoring company, to unload its ships docking in Boston. Clark's initial source of longshoremen is a hiring hall, operated by defendants International Longshoremen's Association (ILA) and its Local 799 pursuant to a collective bargaining agreement between the unions and the Boston Shipping Association.

On January 9, 1980, one of Waterman's ships, the *Walton*, was in Boston unloading a portion of Allied's plywood and hardwood, prior to further unloading at other ports along the East Coast. On that date, defendant Thomas Gleason, President of the ILA, ordered ILA members to cease handling cargoes bound for or arriving from the Soviet Union, in protest of the invasion of Afghanistan by

[1] Defendants moved to dismiss plaintiff's complaint for failure to state a claim on which relief could be granted. Since, in adjudicating this motion, the district court considered various affidavits submitted by the parties, we will treat the motion as if it were a motion for summary judgment. Fed. R. Civ. P. 12(b).

Soviet armed forces.[2] In response to Allied's inquiries, Gleason informed Allied that ILA members would unload the *Walton*'s cargo in Boston, but not at any other United States port. As a result, Waterman cancelled the *Walton*'s scheduled calls, and unloaded all of Allied's wood products cargo in Boston, where it was stored, accruing demurrage and security charges. Waterman also restricted the cargo then being loaded into the *Middleton* in Leningrad to one-third its scheduled size, cancelled its delivery to scheduled United States ports, and unloaded the wood products in Montreal. In addition, Waterman repudiated its agreement to transport Allied's wood products aboard the *Jefferson*, which had not yet been loaded. ILA and Local 799 representatives informed Allied on March 12 and March 25, 1980 that no ILA members would unload any cargo originating in the USSR.

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[2] The directive stated:

"In response to overwhelming demands by the rank and file members of the Union, the leadership of ILA today ordered immediate suspension in handling all Russian ships and all Russian cargoes in ports from Maine to Texas and Puerto Rico where ILA workers are employed.

"This order is effective across the board on all vessels and all cargoes. Grain and other foods as well as high valued general freight. However, any Russian ship now in process of loading or discharging at a waterfront will be worked until completion.

"The reason for this action should be apparent in light of international events that have affected relations between the U.S. & Soviet Union.

"However, the decision by the Union leadership was made necessary by the demands of the workers.

"It is their will to refuse to work Russian vessels and Russian cargoes under present conditions of the world.

"People are upset and they refuse to continue the business as usual policy as long as the Russians insist on being international bully boys. It is a decision in which the Union leadership concurs."

Appendix A

On March 31, 1980, Allied filed a complaint in the district court alleging that the ILA's actions violated (1) the National Labor Relations Act (NLRA) prohibition against secondary boycotts, section 8(b)(4), 29 U.S.C. § 158(b)(4), for which Allied has a private right of action under section 303 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 187, and (2) the Sherman Act, 15 U.S.C. § 1, and (3) constituted tortious interference with Allied's business relationships, in violation of admiralty law. The action was consolidated with *Walsh* v. *ILA*, *supra*, in which the Regional Director of the NLRB sought a preliminary injunction against the ILA Russian boycott. In a memorandum of June 17, 1980, the district court concluded that Allied had failed to state a cause of action on any of its three legal theories, and consequently dismissed the complaint. We examine each of appellant's claims seriatim.

Secondary Boycott

The district court relied on its decision in *Walsh* v. *ILA*, 488 F. Supp. 524 (D. Mass. 1980), in holding that Allied had not alleged a violation of NLRA section 8(b)(4), 29 U.S.C. § 158(b)(4), the secondary boycott prohibition. We did not reach the merits of the secondary boycott question on appeal in *Walsh*, because we considered the issue foreclosed in that case by the decision in *Baldovin* v. *ILA*, Civ. No. 80-259 (S.D. Tex. Feb. 15, 1980). *Baldovin* involved the ILA's refusal to load grain aboard a ship bound for the Soviet Union, and the district court held the NLRB lacked jurisdiction over the dispute because it was not "in commerce." Subsequent to our decision in *Walsh*, the Court of Appeals for the Fifth Circuit affirmed that holding. *Baldovin* v. *ILA*, 626 F.2d 445 (5th Cir. 1980). Because

this case concerns parties different from those in *Baldovin*, that decision has no preclusive effect here. We therefore confront the secondary boycott issue on the merits.

Section 8(b)(4) provides, in pertinent part:

> "(b) It shall be unfair labor practice for a labor organization or its agents—
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> (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—
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> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . ."

We proceed first to the same question decided negatively by the Fifth Circuit in *Baldovin*—whether the secondary activity in question is sufficiently related to commerce to come within the prohibitions of the NLRA. *See* NLRA

§§ 2(6) & (7), 29 U.S.C. §§ 152(6) & (7). While this case does not, as did *Baldovin* and *Walsh*, require consideration of the jurisdiction of the National Labor Relations Board, *see* NLRA § 10(a), 29 U.S.C. § 160(a), the secondary boycott prohibition itself reaches only activities aimed at individuals "employed by any person engaged in commerce or in any industry affecting commerce."

At first blush, it might appear too plain for discussion that the ILA's refusal to unload Allied's goods affects both commerce and a person engaged in commerce. Allied, Waterman and Clark are American companies and the ILA is an American union. All engage regularly in business affecting the transportation of goods among the several states. Indeed, the instant dispute arose when the ILA's actions allegedly impeded Allied's ability to move its wood products from Boston to other ports along the East Coast, and Allied contends that the ILA continues to frustrate its ability to transport its goods into this country.

However, the terms "in commerce" and "affecting commerce," as used in the NLRA, are "obviously not self-defining," *Windward Shipping (London) Ltd.* v. *American Radio Association*, 415 U.S. 104, 112 (1974). They must be considered in light of the gloss placed upon them in a series of Supreme Court cases dealing with the scope of jurisdiction under the Act.

In *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138 (1957), the Court held that the protections of the Act did not extend to picketing by American unions in support of a strike staged by foreign seamen against their foreign shipowner-employers. Since Congress did not intend the Act to cover "wage disputes arising on foreign vessels between nationals of other countries," *id.*, at 142, the Act

did not preempt a state law damage action brought by the shipowners against the unions.

While *Benz* relied solely on the legislative history of the NLRA, *Incres Steamship Co.* v. *International Maritime Workers Union*, 372 U.S. 24 (1963), joined the *Benz* rationale to the Act's "affecting commerce" terminology. *Incres*, like *Benz*, considered whether the NLRA deprived a state court of jurisdiction over picketing of foreign-flag ships by American unions in support of a labor dispute between shipowners and a foreign crew. Concluding that "maritime operations of foreign-flag ships employing alien seamen are not 'in commerce' within the meaning of [NLRA] § 2(6)," *id.*, at 27, the Court held that the Act did not protect the picketing from operation of state law. In *McCulloch* v. *Sociedad Nacional de Marineros*, 372 U.S. 10 (1963), a companion case to *Incres*, the Court held that the NLRB had no jurisdiction to order a "representation election" among the foreign crews of foreign-flag vessels.

In contrast, the Court in *ILA, Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195 (1970), held that picketing directed at foreign-flag ships in order to protest substandard wages paid to non-union American longshoremen *was* arguably protected by section 7 of the Act, and thus not subject to the jurisdiction of the Florida courts. As the Court later described the case, in *Windward Shipping (London) Ltd.* v. *American Radio Association*, *supra*, 415 U.S. at 114, *Ariadne* differed from *Benz* and *Incres* in that the protest "could be accommodated by a wage decision on the part of the shipowners which would affect only wages paid within this country." In *Windward Shipping* itself, however, the Court again held that picketing foreign ships to protest wages paid to foreign seamen was not activity "affecting commerce," even though the picketing was staged

by American unions not in support of the foreign crew but to publicize the competitive advantage enjoyed by the foreign ships vis-a-vis American shippers which employed American union members. According to the *Windward* Court, the line of cases beginning with *Benz* sought to delineate "the threshold of interference with the maritime operations of foreign vessels which makes the [Act] inapplicable." *Id.*, at 114. Because the pickets in *Windward* "[a]t the very least . . . must have hoped to exert sufficient pressure so that foreign vessels would be forced to raise their operating costs to levels comparable to American shippers," thus occasioning "more than a negligible impact on the 'maritime operations' of these foreign ships," *id.*, the dispute was at root an attempt to interfere with the internal workings of a foreign vessel, the sort of controversy to which the Act had already been held not to apply in *Benz* and *Incres*.

Were this the extent of the precedent before us, we would have little hesitation finding the instant dispute within the coverage of the NLRA. We note that all of the above cases involved the question whether the Act affirmatively protected union activity directed at the working conditions aboard foreign-flag vessels (with the exception of *Ariadne*, in which the Act was found to apply). None considered the scope of the secondary boycott provisions, or whether secondary activity by an American union against an American employer was outside the purview of those provisions simply because "motivated" by a "primary dispute" between the union and a foreign entity. To find that the picketing in *Incres*, *Benz* and *Windward* was protected by the Act would have implied the jurisdiction of the NLRB over the foreign labor conditions that gave rise

to the picketing. This, in turn, "would necessitate inquiry into the 'internal discipline and order' of a foreign vessel, an intervention though likely to 'raise considerable disturbance not only in the field of maritime law but in our international relations as well.'" *ILA, Local 1416* v. *Ariadne Shipping Co., supra*, 397 U.S. at 198 (*quoting McCulloch* v. *Sociedad Nacional de Marineros, supra*, 372 U.S. at 19). In *McCulloch*, the Court confronted an *actual* attempt by the Board to interfere in what was essentially a foreign labor dispute.

In such cases there exist considerations of "comity and accommodation in international trade," *Windward, supra*, 415 U.S. at 113, clearly not present in the instant action. Here, an American union has ordered its members not to work for an American stevedore which had contracted to service an American ship carrying goods of an American importer, insofar as the work would involve handling goods originating in the Soviet Union. There is no question of interference in the affairs of a foreign employer. Moreover, while the work stoppage was motivated by what might be termed a "primary dispute" between the ILA and the USSR over the latter's military policy,[3] it would be

[3] The elusiveness of any attempt to fit aspects of this rather unique case comfortably within the traditional categories of labor law is illustrated by the fact that the "primary dispute" could just as easily, and perhaps more appropriately, be characterized as one between Afghanistan and Russia (or assuming the viewpoint of the ILA, between the Soviet Union and American governments). There is no dispute between the ILA and Russia over matters traditionally thought to be the subject of union concern.

In *Madden* v. *Grain Elevator Workers Local 418*, 334 F.2d 1014 (7th Cir. 1964), *cert. denied*, 379 U.S. 967 (1965) (discussed *infra*), an American union directed employees of an American grain wholesaler not to load grain onto ships owned by a Canadian employer engaged in a dispute with a Canadian union. There was no suggestion of a primary dispute—or any dispute—between the American union and the Canadian shipper, regardless of the fact

absurd to contend that application of the secondary boycott provisions would imply NLRB jurisdiction over *this* primary dispute, *i.e.*, over Soviet military policy. By the same token, the inability of the NLRB to adjudicate the propriety of the Soviet Union's incursion into Afghanistan need not, at least as a matter of logic, inexorably preclude a finding that the "secondary dispute" on which this lawsuit is based satisfies the jurisdictional requirements of section 8(b)(4). What is at stake is simply whether an American firm is entitled to be shielded by the Act from illegal actions in this country directly affecting its domestic business.

Our consideration of the issue is complicated, however, by the Supreme Court's decision in *American Radio Association* v. *Mobile Steamship Association*, 419 U.S. 215 (1974). *Mobile* involved facts similar to those in *Windward*. Six maritime unions engaged in picketing designed to publicize the adverse impact on American seamen of the low wages paid foreign crews working on foreign-flag carriers. In *Windward*, it was the shipowners who had sued the unions, and the Court rejected the unions' claim that the picketing was protected by section 7 of the Act. In *Mobile*, the plaintiffs were American stevedoring companies which sought to service the ships, and the unions defended on the ground that, since the picketing was arguably *prohibited* by section 8(b)(4), state court jurisdiction was preempted. Faced with this attempt to distinguish the

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that the American union may have disapproved of the way in which the Canadian employer was treating Canadian union members. In conventional labor law analysis, the court found the primary dispute to be between the Canadian employer and the Canadian union, and the secondary dispute to be between the American union and the American employer. If the analogy is followed here, the primary dispute is between the USSR and Afghanistan, and the secondary dispute between the ILA and persons carrying Russian-made goods.

controversy between the unions and the ships from that between the unions and the stevedores, the Court rejected the argument "that the line of cases commencing with *Benz* and culminating in *Windward* permit such a bifurcated view of the effects of a single group of pickets at a single site." *Id.*, at 222.

There is language in *Mobile* that can be read as indicating that the reach of the secondary boycott prohibition depends solely on the nature of the underlying "primary dispute" giving rise to the secondary activity. The rejection of a "bifurcated view" of a union's actions might seem to imply that characterizations of the primary dispute as not "in commerce" controls the jurisdictional issue. *See Baldovin* v. *ILA, supra*, 626 F.2d at 452-43. *See also Walsh* v. *ILA, supra*, 630 F.2d at 874-75 & n.13. Indeed, the *Mobile* majority apparently rejected, in the course of discussing precedent relied upon by the four dissenters, "the proposition that a secondary employer's domestic business activities may be the basis for Board jurisdiction where the primary dispute is beyond its *statutory* authority over unfair labor practices 'affecting commerce.'" *Id.*, at 226.

On the other hand, the Court also said that *Mobile* "need cast no doubt on those cases which hold that the Board has jurisdiction under § 8(b)(4) of domestic secondary activities which are in commerce, even though the primary employer is located outside the United States. *See Madden* v. *Grain Elevator Workers Local 418*, 334 F.2d 1014 (CA7 1964), *cert. denied*, 379 U.S. 967 (1965); *Grain Elevator Workers Local 418* v. *NLRB*, 126 U.S. App. D.C. 219, 376 F.2d 774, *cert. denied*, 389 U.S. 932 (1967)." 419 U.S. at 225 n.10. *Madden* and *Grain Elevator Workers* both involved the same dispute. A Canadian union was engaged in a labor dispute with a Canadian shipper-employer. In

support of the Canadian union, Grain Elevator Workers, an American union representing employees of the American secondary employer, induced its member-employees to cease loading the American employer's grain onto the Canadian ships. Both courts soundly rejected the contention that the NLRB lacked jurisdiction over the secondary boycott. As the court said in *Madden*:

> "No attempt is being made to regulate or to apply the Act to the 'internal management or affairs' of the Upper Lakes Ships . . . . No conflict between American and Canadian policies can result from halting an illegal secondary boycott in this country, directed against an American employer by an American labor organization and involving employees working in a domestic plant of the American employer."

334 F.2d at 1019.

We think, likewise, that application of section 8(b)(4) here would portend no interference in the management or affairs of foreign companies, workers, or labor organizations. This case is thus far removed from the situation that faced the Court in *Mobile*. There, the Court was concerned, as it had been in *Windward*, with an attempt by picketing unions to influence the "internal maritime operations of foreign ships." The Court noted that

> "the response of the employees of the American stevedores was a crucial part of the mechanism by which the maritime operations of the foreign ships were to be affected . . . . The effect of the picketing on the operations of the stevedores and shippers, and thence on these maritime operations, is precisely the same whether it be complained of by the foreign-ship owners

> or by persons seeking to service and deal with the ships."

419 U.S. at 224-25. We read *Mobile* as establishing that in the case of interrelated labor disputes, particularly disputes that give rise to similar conduct carried out at a single site, a "primary dispute" cannot be extricated from a "secondary dispute" for purposes of contrary jurisdictional findings.

Here, however, there is no attempt to "bifurcate" the effects of a single union action. The *only* labor-related activity in issue has been played out by an all-American cast. The fact that this domestic labor dispute was inspired by military events in foreign lands—events far beyond NLRB jurisdiction—does not counsel against application of the NLRA to the labor dispute ongoing here at home. In sum, none of the considerations that prompted the Court in cases such as *Windward*, *Incres*, and *Benz* to find the Act inapplicable have force in this context. We hold, therefore, that section 8(b)(4) applies, and we must thus determine whether the ILA's activities are proscribed by that section.[4]

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[4] Contrary to the suggestion in Judge Aldrich's separate opinion, this conclusion is not dependent on the "result reached." We quite agree that "either an act of Congress covers a particular dispute or it does not"; in our view, however, section 8(b)(4) "covers" this dispute, and we believe that the scope of the *Benz-Mobile* line of cases is narrower than the dissent/concurrence would have it. We understand our brother to construe the *Benz-Mobile* line as reflecting a fundamental principle that Board jurisdiction exists only where the Board has jurisdiction over the primary dispute. But we think those cases are adequately explained on the principle that in a case involving *intertwined* "primary" and "secondary" *labor* disputes, lack of Board jurisdiction over the primary dispute will preclude Board jurisdiction over the secondary conduct—more particularly where a contrary ruling might well suggest an improper interference by the United States in the relationship between foreign employers and laborers. We see no need to extend *Benz-Mobile* beyond this.

Appendix A

In *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 U.S. 93, 98 (1958), the Supreme Court formulated a three-part test to identify a violation of section 8(b)(4):

> "Employees must be induced; they must be induced to engage in a strike or concerted refusal; an object must be to force or require their employer or another person to cease doing business with a third person."

There can be little doubt that the first two parts of this test are met here: it is uncontroverted that the ILA leadership directed ILA members, including members of Local 799, employees of Clark, to engage in a concerted refusal to handle a certain class of goods which Clark had contracted to service. The ILA argues, however, that it lacked an "object" to bring about the entirely foreseeable result of its action—the forced cessation of business between Clark and Waterman, and Waterman and Allied, in relation to Russian goods being transported into this country.

According to the ILA, its "sole object is to vindicate the consciences of its members who find it repugnant to do business as usual with the aggressor and, by passive action, to protest politically the invasion of Afghanistan." [5] However, the ILA has chosen to carry out its goal of protest through action—a selective work stoppage—which by its very nature is designed to force at least partial cessation of business between companies with which ILA has no labor-related grievance. While the ILA boycott may be

[5] Accepting that the boycott sought to protest Soviet aggression, we may still note that this goal of protest was certainly furthered by causing Clark and Waterman to cease handling Allied's Russian-made goods—and was additionally enhanced by Allied's resulting cutback in its trade with the Soviet Union.

a heartfelt act of protest against conduct that the ILA leadership and many ILA members find "repugnant," we cannot accept the proposition that this negates a finding that the "objective" of the boycott is one proscribed by section 8(b)(4). Nor do we think that this section was meant to permit any and all union actions designed to keep union members from "doing unconscionable work" or to protect their "moral integrity, spiritual welfare, and political convictions."

It is well established that a union engages in prohibited secondary activity when it induces employees of a neutral employer to refuse to handle or work on goods originating from or bound for a particular person with whom the union, or another labor group, is having a dispute. *NLRB* v. *Local No. 3, International Brotherhood of Electrical Workers,* 477 F.2d 260 (2d Cir.) (refusal to install material delivered by non-union employees), *cert. denied,* 414 U.S. 1065 (1973); *Grain Elevator Workers Local 418* v. *NLRB,* 376 F.2d 774 (D.C. Cir.) (refusal to load grain on ships owned by Canadian employer embroiled in foreign labor dispute), *cert. denied,* 389 U.S. 932 (1967); *Madden* v. *Grain Elevator Workers Local 418,* 334 F.2d 1014 (7th Cir. 1964) (same), *cert. denied,* 379 U.S. 967 (1965); *NLRB* v. *Local 810, Steel, Fabricators & Warehousemen,* 299 F.2d 636 (2d Cir. 1962) (refusal to work for secondary employer in connection with contract with primary employer against which union conducting strike); *NLRB* v. *Brewery & Beer Distributor Drivers, Local 830,* 281 F.2d 319 (3d Cir. 1960) (refusal to load beer orders bound for companies which had not signed union agreement); *NLRB* v. *Wine Workers Union Local 1,* 178 F.2d 584 (2d Cir. 1949) (refusal by employees of distributors to handle product of company engaged in strike with sister union). Of any of these cases it could be said

that the defendant unions and their members would have found it "repugnant" to facilitate the business of companies they thought were, for example, mistreating brother laborers or paying substandard wages. *Cf. NLRB* v. *Local No. 3, International Brotherhood of Electrical Workers, supra,* 477 F.2d at 263 (concerted refusal to handle said to result initially from "individual acts of conscience"). Yet when a union orders all employees of a neutral employer to cease handling goods originating from a particular source, it is *a fortiori* forcing that employer to "cease doing business with" that source. In such a case, it difficult to say that the cessation of business is not at least *an* object of the union order, in the absence of facts that might indicate the contrary; and it is not necessary that the cessation of business be the *sole* object in order to be an object prohibited under section 8(b) (4), *NLRB* v. *Denver Building & Construction Trades Council,* 341 U.S. 675, 689-90 (1951).

We think that the object of a boycott, for purposes of section 8(b) (4) (ii) (B), can be inferred from the virtually inevitable results generated by it, at least when, as here, the union's conduct can under no reading of the facts be characterized as "primary activity" protected by the Act.[6]

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[6] The conclusion might be somewhat different in a situation where identical union conduct could be found to be either protected primary activity or unlawful secondary activity depending on the union's objective. For example, in *National Woodwork Mfrs. Ass'n* v. *NLRB,* 386 U.S. 612 (1967), the Court considered whether a union's refusal to handle prefabricated goods was a protected effort to preserve the jobs of union members or activity calculated to satisfy the union's objectives elsewhere. The Court held that once it was found, by reference to circumstances such as "the threat of displacement by the banned product or services, the history of labor relations between the union and the employers who would be boycotted, and the economic personality of the industry," *id.,* at 644 n.38, that the union action *did* serve the legitimate purpose of work preservation, the conduct could not be held un-

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See NLRB v. *Retail Store Employees Union, Local 1001*, 100 S.Ct. 2372 (1980); *NLRB* v. *Local 825, International Union of Operating Engineers*, 400 U.S. 297 (1971); *NLRB*

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lawful simply because it had the ancillary effect of diminishing business between the employer and the source of the prefabricated materials. *Cf. NLRB* v. *Enterprise Ass'n & General Pipefitters, Local 638*, 429 U.S. 507 (1977) (objective of work preservation will not protect pressure leveled against employer with no power to assign work sought).

The Court recently faced a similar situation in *NLRB* v. *ILA*, 100 S.Ct. 2305 (1980), which involved the ILA's "Rules on Containers," characterized by the Board as a "hot cargo" provision and by the union as a "work preservation agreement." The Court remanded the case to the Board for further consideration, holding that the dispositive issue was whether the agreement had the effect of preserving work of the sort performed by ILA members prior to the era of containerization, and not whether the agreement would displace work performed by truckers and consolidators after the introduction of containerized shipping. In the course of criticizing the Board's treatment of the case, the Court noted that, should the agreement be found to preserve work for union members, it would not matter that it also generated secondary effects:

> "The effect of work preservation agreements on the employment opportunities of employees not represented by the union, no matter how severe, is of course irrelevant to the validity of the agreement so long as the union had no forbidden secondary purpose to affect the employment relations of the neutral employer."

Id., at 2315 n.22. In the context in which this statement was made, it reflects nothing more than a reiteration of the accepted proposition that a union is entitled to engage in primary activity no matter how severe the incidental effects on neutral parties. *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 627 (1967). It should be noted, moreover, that the Court directed the Board to determine whether the agreement had "as its objective" the preservation of work traditionally performed by union members by focusing on the "nature of the work both before and after [containerization]"—*i.e.*, an examination of external facts and circumstances. It was nowhere suggested that the union leadership's subjective "intent" to preserve jobs would save such an agreement that did not, in fact, have the effect of preserving work. The ILA boycott at issue here does not have the *effect* of realizing *any* protected union goal.

v. *Twin City Carpenters District Council*, 422 F.2d 309, 314 (8th Cir. 1970). The Supreme Court recently held, in *NLRB* v. *Retail Store Employees Union, supra*, that section 8(b) (4) forbids secondary picketing against a "struck product" when such picketing "*predictably* encourages consumers to boycott a neutral party's business," 100 S.Ct. at 2374 (emphasis added). In determining whether the union's "object" was one proscribed by section 8(b) (4), the Court not only held that the union was "responsible for the foreseeable consequences of its conduct," *id.*, at 2377 n.9, it did so in a context in which the union's activity—picketing a struck product—differed only in degree from conduct that had already been held to be protected primary activity in *NLRB* v. *Fruit & Vegetable Packers, Local 760*, 377 U.S. 58 (1964). Holding the picketing in *Retail Store Employees* to constitute a forbidden secondary boycott, the Court focused almost exclusively on the nature of the foreseeable injury to neutral parties: "Product picketing that *reasonably can be expected* to threaten neutral parties with ruin or substantial loss simply dos not square with the language or the purpose of § 8(b) (4) (ii) (B)." 100 S.Ct. at 2377 (emphasis added).

It has long been recognized that section 8(b) (4) was enacted for the purpose of "shielding unoffending employers and others from pressures in controversies not their own." *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 627 (1951). Balanced against this congressional objective is the "right of labor organizations to bring pressure to bear on offending employers in primary labor disputes." *Id.* This competing concern is reflected in the proviso of section 8(b) (4) (ii) (B)—which exempts from the section "any primary strike or primary picketing"—and in the affirmative protection accorded pri-

mary union activity under the NLRA. Thus, unions are protected when engaging in primary activity no matter how severe the impact on neutral employers, *id.*, at 627, but are forbidden from pressuring an employer when the pressure is "calculated to satisfy union objectives elsewhere." *Id.*, at 644. *See also NLRB* v. *Enterprise Association & General Pipefitters*, 429 U.S. 507, 528 (1977).

In this case neither of these "dual congressional objectives" would be furthered by finding the ILA boycott beyond the scope of section 8(b)(4). We think it plain that the ILA was not engaged in primary activity and that the boycott against Allied's goods was "calculated to satisfy union objectives elsewhere." The ILA concedes it has no dispute with Clark, Waterman or Allied, and there is no suggestion that it seeks to affect the labor relations of any of these employers. It is also plain that these "unoffending employers" have been embroiled in a "controversy not their own" as a result of union action which "reasonably could be expected" to "threaten a neutral party with ruin or substantial loss," *cf. NLRB* v. *Retail Store Employees Union, supra*, 100 S.Ct. at 2377.[7]

The district court in *Walsh* v. *ILA, supra*, nevertheless held that the ILA boycott did not violate section 8(b)(4) because the "primary dispute" was not a "labor dispute." 488 F. Supp. at 530. In so holding, the court relied in large part on the following language from *Mishara Construction Co.* v. *International Brotherhood of Electrical Workers*,

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[7] The fact that the ILA did not engage in more extensive forms of coercion—*e.g.*, picketing or a total boycott of employers trading with Russia or handling Russian cargo—does not dictate the conclusion that its limited boycott had no proscribed object. *See NLRB* v. *Twin City Carpenters District Council*, 422 F.2d 309, 315 (8th Cir. 1970); *Local 5, United Ass'n of Journeymen* v. *NLRB*, 321 F.2d 366, 370 (D.C. Cir.), *cert. denied*, 375 U.S. 921 (1963).

554 F.2d 488, 491 (1st Cir. 1977): "the statutory prohibition only applies when employees of a secondary employer are induced to strike or . . . to use other economic pressures against their employer to aid a union that has a dispute with another employer." The district court interpreted this passage to require a dispute with a "primary employer" before a violation of section 8(b)(4) could be found. As the district court noted, however, this statement was made in the course of dealing with an entirely different issue—whether the union had used the sort of "coercive" measures a violation of the section requires.

To be sure, descriptions of the reach of the secondary boycott prohibition are normally couched in terms of union conduct emanating from a primary "labor dispute," since this is the typical situation in which section 8(b)(4) is, and was meant to be, applied. For example, the Supreme Court has said that enactment of the section was prompted by "[c]ongressional concern over the involvement of third parties in *labor disputes not their own.*" *NLRB* v. *Local 825, International Union of Operating Engineers*, 400 U.S. 297, 302 (1971) (emphasis added). However, this language does not suggest that it is permissible under section 8(b)(4) for a union to direct pressure against a neutral employer in order to satisfy objectives unrelated to any "labor dispute" at all. Such an interpretation would be contrary to the congressional purpose behind the section, and we reject it. *Cf. National Maritime Union* v. *NLRB*, 342 F.2d 538 (2d Cir.), *cert. denied*, 382 U.S. 835 (1965); *National Maritime Union* v. *NLRB*, 346 F.2d 411, 416-20 (D.C. Cir.), *cert. denied*, 382 U.S. 840 (1965); *NLRB* v. *Twin City Carpenters District Council*, 422 F.2d 309, 312-13 (8th Cir. 1970); *NLRB* v. *Local No. 751, Carpenters*, 285 F.2d 633, 639 & n.6 (9th Cir. 1960).

Appendix A

We think it more rather than less objectionable that a national labor union has chosen to marshal against neutral parties the considerable powers derived by its locals and itself under the federal labor laws in aid of a random political objective far removed from what has traditionally been thought to be the realm of legitimate union activity. *Cf. NLRB* v. *Washington-Oregon Shingle Weavers' District Council*, 211 F.2d 149, 152 (9th Cir. 1954) (boycott ordered "not because of any dispute, but merely because the union dislikes the producer for any reason, or for no reason, . . . would appear even more reprehensible"). The labor laws do not confer upon bargaining representatives a voice in the conduct of foreign policy. The fact that there have been few, if any, cases that have applied the secondary boycott provisions to activity motivated by a "purely political dispute"[8] illustrates little more than the rarity with which labor unions have seen fit to engage in this sort of "political strike" conduct. The language of section 8(b)(4) and the congressional objectives that prompted its enactment point to no reason why the section should not prohibit such secondary pressure, for whatever reasons motivated. The potential danger of uncontrolled, whimsical activity is obvious. It must be remembered that a union's ability to apply crippling secondary pressure is greatly enhanced by its position under the federal labor laws; without even the justification of a labor-oriented motive, such forbidden secondary activity is *a fortiori* precluded.[9]

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[8] *But cf.* the decision of the NLRB in *Local 1355, ILA and Ocean Shipping Service, Ltd.*, 146 NLRB 723 (1964), *reversed* by the Fourth Circuit in *NLRB* v. *ILA*, 332 F.2d 992 (4th Cir. 1964), discussed *infra*.

[9] The district court also characterized the ILA action as "a primary boycott of Russian goods, with incidental effects upon those employers who deal in such goods." 488 F. Supp. at 531. Clearly this is not the case. The ILA boycott does not differ in this regard

Likewise, we reject the view, apparently adopted by the district court, that section 8(b)(4) may not be applied to national boycotts undertaken as a form of "political expression." To our knowledge, the only other precedent that would support such a sweeping proposition is *NLRB* v. *ILA (Ocean Shipping Services)*, 332 F.2d 992 (4th Cir. 1964), which involved the ILA's refusal, during the height of the Cuban missile crisis in 1962, to load ships that were trading or had traded with Cuba. The court decided the case on the ground that the NLRB lacked jurisdiction over the dispute, but "deem[ed] it appropriate to consider further" whether an unfair labor practice had been alleged. The court then suggested that a politically motivated and selective boycott would not violate section 8(b)(4) because "if the bare refusal to work in the circumstances shown should be held illegal, the union would be deprived of its right of expression and the proviso of section 8(b)(4)(ii)(B) would be emptied of meaning." *Id.*, at 997.

We cannot agree that prohibiting the ILA from ordering employees not to handle Russian goods would rob either the ILA or its members of their "right of expression." (Nor can we understand why, in any event, the proviso of section 8(b)(4)(ii)(B) would thereby "be emptied of meaning"; this proviso protects only a "primary strike or primary picketing.") Certainly the union and its members have numerous alternative forms of "expression" left to them, including the right to assemble or leaflet in protest of

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from innumerable refusals to handle "hot cargo" that have been held to be prohibited secondary activity, *e.g.*, *NLRB* v. *Local 3, Int'l Bhd. of Electrical Workers*, 477 F.2d 260 (2d Cir.), *cert. denied*, 414 U.S. 1065 (1973); *NLRB* v. *Wine Workers Union Local 1*, 178 F.2d 584 (2d Cir. 1949); and cases cited at page 12 *supra*. These cases might likewise have been described as boycotts of a primary employer's "goods" with "incidental effects" on the secondary employers that dealt with the goods.

Appendix A

Russian aggression and the right to petition and lobby elected representatives in pursuit of a reassessment of United States foreign policy regarding American-Russian trade.[10] By resorting to coercive tactics against neutral parties, the union has exceeded the bounds of "political expression" in its pure form; indeed, the sort of union-directed work stoppage at issue here is much farther removed from "pure" expression than the peaceful picketing that has been found to violate section 8(b)(4) in numerous cases.[11] *E.g., NLRB* v. *Retail Store Employees Union, Local*

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[10] In response to the Soviet invasion of Afghanistan, the United States government placed certain restrictions on exports to the USSR but did not imppose any restrictions that would limit the importation of Russian wood products. *See generally* President's Message on the State of the Union, 126 Cong. Rec. H. 20, reprinted in [1980] U.S. Code Cong. & Ad. News 112-13.

[11] We also note that the ILA directive orders *all* ILA members to "express themselves" in a manner that may well be contrary to the views of some. *See Hampton Roads Shipping Ass'n* v. *ILA*, Civ. No. 80-186-N (E.D. Va. March 1980), slip op. at 10 ("the Union's position that its action constitute [sic] only the joint expression of its members' opinion . . . is neither factually nor legally supportable. No evidence of a mandate from the Union's membership has been presented, nor did the Union make any effort to notify its members or employees that Union members who wished to work or who did not support this action could ignore the Union's order without fear of retaliation."). *Cf. Abood* v. *Detroit Board of Educ.*, 431 U.S. 209, 234-36 (union may not finance "expression of political views, on behalf of candidates, or toward the advancement of other ideological causes not germane to its duties as collective-bargaining representative" through assessments paid by employees who object to advancing such ideas). Whatever the rights of individual ILA members to refuse work as an act of conscience—an issue we need not decide—the ILA directive went considerably beyond anything necessary to enable these members to assert such a right. *See Truck Drivers & Helpers Local 728*, 119 NLRB 399, 407 (1957) ("what is here involved is not an assertion of individual right by individuals, but rather the formulation and enforcement by the Respondent Union as a labor organization . . . of a collective policy or program"). *See also NLRB* v. *Local 74, United Bhd. of Carpenters*, 341 U.S. 707, 713 (1951).

1001, supra, 100 S.Ct. 2372; *International Brotherhood of Electrical Workers* v. *NLRB,* 341 U.S. 694 (1951). For this reason we also reject ILA's argument that its concerted conduct, carried out on orders of top union management, is protected by the first amendment. *See also American Radio Association* v. *Mobile Steamship Association,* 419 U.S. 215, 229-31 (1974); *Teamsters Union* v. *Vogt, Inc.,* 354 U.S. 284 (1957).

In conclusion, we hold that Allied has alleged a violation of NLRA section 8(b) (4). We therefore vacate the district court's dismissal of Count I of the complaint, and remand for further consideration of Allied's prayer for damages and preliminary and permanent injunctive relief.

Sherman Act

We next proceed to whether or not the ILA boycott amounts to a violation of section 1 of the Sherman Act. As such a violation would entitle Allied to treble damages, this issue is not mooted by our holding that a cause of action exists under the NLRA. We first consider whether the union's activity falls within the statutory "labor exemption" from the antitrust laws. Clayton Act §§ 6 & 20, 15 U.S.C. § 17 and 29 U.S.C. § 52; Norris-LaGuardia Act, 29 U.S.C. §§ 101-15. In *United States* v. *Hutcheson,* 312 U.S. 219 (1941), the Supreme Court held that, in light of these statutory provisions, the Sherman Act does not proscribe union activity "so long as [the] union acts in its self-interest and does not combine with non-labor groups." *Id.,* at 232. This standard, which has been referred to as the "two-prong test," has been developed in a series of Supreme Court cases. *E.g., Allen Bradley Co.* v. *Local 3, International Brotherhood of Electrical Workers,* 325 U.S. 797 (1945); *United Mine Workers* v. *Pennington,* 381 U.S. 657

(1965); *American Federation of Musicians* v. *Carroll*, 391 U.S. 99 (1968); *Connell Construction Co.* v. *Plumbers Local 100*, 421 U.S. 616 (1975).

While "the test to determine if a union's actions are in its 'self-interest' has not been precisely formulated," the principle that emerges from the above cases is that activities are in the self-interest of a labor organization "if they bear a reasonable relationship to a legitimate union interest." *Adams, Ray & Rosenberg* v. *William Morris Agency*, 411 F. Supp. 403, 410 (C.D.Cal. 1976). In particular, the labor exemption has been applied when the union acts to protect the wages, hours of employment, or other working conditions of its member-employees, objectives that are at the heart of national labor policy. We think the district court was correct in concluding that the ILA's "political dispute" with the Soviet Union does not relate to a "legitimate union interest" as that term has been defined in American labor history and law, and thus that the ILA boycott is not immunized by statute from operation of the antitrust laws.[13]

The question still remains whether the ILA's refusal to handle Russian-made goods is the sort of activity which the Sherman Act was intended to proscribe. Allied seeks to characterize the boycott as a "concerted refusal to deal," and, in a literal sense, it is. On the other hand, there are significant differences between the activity at issue in this case and the sorts of "concerted refusals to deal" that have been found per se unlawful under the Sherman Act.

The classic anticompetitive "group boycott" is a concerted action by competitors at one level to protect themselves from competition by non-group members who seek

[13] There is no real indication that the ILA "conspired" with any non-union group.

to compete at that level. Sullivan, *Handbook of the Law of Antitrust* 230, 261-62 (1977). *See, e.g., Fashion Originators Guild* v. *FTC*, 312 U.S. 457 (1941); *Eastern States Retail Lumber Dealers' Association* v. *United States*, 234 U.S. 600 (1914). While many of the boycotts that have been found per se illegal have involved the participation of suppliers or customers of the boycotted firm, *e.g., Klor's Inc.* v. *Broadway Hale Stores, Inc.*, 359 U.S. 207 (1959), "it is [the] purpose to exclude competition that has characterized the Supreme Court's decisions invoking the group boycott per se rule." *Smith* v. *Pro Football, Inc.*, 593 F.2d 1173, 1178 (D.C. Cir. 1978). There is no allegation here that the ILA is engaged in an effort to drive Allied out of business or, indeed, that the ILA has any economic or commercial objective in pursuing the boycott of Russian goods.

It is not the motivation for the boycott alone that distinguishes this case from the paradigmatic anticompetitive refusal to deal, but also its scope. ILA members are not refusing to handle any and all goods imported by Allied, in retaliation for Allied's dealings with the Russians. *Cf. Missouri* v. *National Organization for Women, Inc.*, 620 F.2d 1301 (8th Cir. 1980) (politically motivated boycott of all convention facilities in states that had not ratified proposed equal rights amendment). ILA members have refrained from boycotting any ships not involved in trade with the Soviet Union, including ships owned by carriers which maintain Russian trade elsewhere. The limited scope of the boycott, while it does not immunize the conduct from antitrust scrutiny, is relevant to the question of the significance of the action's anticompetitive purpose or effect.

We think this limited refusal to handle goods, undertaken as a political protest by a labor union acting on its own, and ill-designed as a means of gaining a competitive or

commercial advantage for the union or its members, is not the sort of evil at which the Sherman Act is aimed. The Sherman Act was a product of "the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern." *Apex Hosiery* v. *Leader*, 310 U.S. 469, 442-43 (1940). The Supreme Court has said that "the Act is aimed primarily at combinations having commercial objectives and is applied only to a limited extent to organizations, like labor unions, which normally have other objectives." *Klor's Inc.* v. *Broadway-Hale Stores, Inc., supra*, 359 U.S. at 213 n.7. While we have rejected appellees' claim that the boycott falls within the statutory exemption from the antitrust laws, we nevertheless think that it would be a rare case when, absent a specific anticompetitive object or collaboration with non-labor groups, a mere refusal to work by members of a labor union, even though the result of concerted action, would be held to violate the Sherman Act. *See Hunt* v. *Crumboch*, 325 U.S. 821, 824 (1944) ("It is not a violation of the Sherman Act for laborers in combination to refuse to work"); *Apex Hosiery, supra*, 310 U.S. at 500-504. We hold that the ILA activity at issue here is not sufficient to warrant application of the antitrust laws. *Cf. Marjorie Webster Junior College* v. *Middle States Association of Colleges and Secondary Schools, Inc.*, 432 F.2d 650, 654 (D.C. Cir.), *cert. denied*, 400 U.S. 965 (1970).

This conclusion is fortified, though not compelled, by our finding, *supra*, that the facts alleged make out a violation of LMRA § 303(a), 29 U.S.C. § 187(a). While the prohibitions of labor law and antitrust law overlap to some degree, it

has been said that, in general, "§ 303 was enacted as an alternative to subjecting unions to antitrust liability for secondary activities" amounting to a violation of section 8(b)(4) of the Act. *Mead* v. *Retail Clerks International Association, Local 839*, 523 F.2d 1371, 1376 (9th Cir. 1975). *Cf. Connell Construction Co.* v. *Plumbers Local 100*, 421 U.S. 616, 634-35 (1975); *id.*, at 646 (Stewart, J., dissenting).

Admiralty Tort

Finally, we turn to the claim of tort liability. Allied contends that the ILA boycott wrongfully interfered with its "existing and prospectively advantageous business relationships" and that this amounted to tortious conduct said to be cognizable in admiralty because of its relationship to maritime service, commerce and navigation. *See Carroll* v. *Protection Maritime Insurance Co., Ltd.*, 512 F.2d 4 (1st Cir. 1975). In light of our conclusion that Allied has alleged a violation of LMRA section 303 based on the same facts, we think the claim in tort, whether governed by federal maritime or state common law, cannot stand.

The Supreme Court has held that section 303 displaces state law in private damage actions based on peaceful union secondary activity. *Local 20, Teamsters Union* v. *Morton*, 377 U.S. 252 (1964); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236 (1958). We think the rationale behind these cases suggests that in enacting section 303 Congress also meant to supersede any federal common law that might upset the balance carefully drawn between the rights of management and labor in national labor policy. In *Local 20, Teamsters Union* v. *Morton, supra*, 377 U.S. at 261, the Court said that the area of secondary boycotts is one "of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal

relations which they affect must be deemed governed by federal law *having its source in those statutes*, rather than by local law" (*quoting Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U.S. 173, 176 (1942) (emphasis added)). In this context, an admiralty action sounding in tort would function simply as a substitute for "local law," applicable to tortious acts having a sufficient nexus to maritime commerce. No reasons are advanced why such an action should survive enactment of the federal labor laws whereas a similar state action would not. *See Navios Corp.* v. *National Maritime Union*, 236 F. Supp. 657 (E.D. Pa. 1964), *aff'd*, 359 F.2d 853 (3d Cir.), *cert. denied*, 385 U.S. 900 (1966). We hold therefore that the district court properly dismissed Count III of the complaint.

Reversed and remanded.

ALDRICH, *Senior Circuit Judge* (concurring and dissenting).

While I agree with part of the court's thorough opinion, and with the conclusion that plaintiffs are entitled to relief, I feel more comfortable with a different route. For the reasons given by the court I agree that this is not a Sherman Act case. I have doubts, however, whether relief is within the reach of the NLRA.

By my reading, the *Benz* line of cases cited by the court establishes the general proposition that the NLRA does not reach, directly or indirectly, labor controversies in which the "primary" dispute relates to the internal affairs of a foreign entity (in those cases, foreign shipowners). *See American Radio Ass'n* v. *Mobile Steamship Ass'n*, 1974, 419 U.S. 215, 221-26 *(Mobile); Windward Shipping (Lon-*

don) Ltd. v. *American Radio Ass'n*, 1974, 415 U.S. 104, 109-13 *(Windward)* and cases cited. The one exception is where the primary dispute centers around the foreign entity's employment relations with American labor. *See ILA, Local 1416* v. *Ariadne Shipping Co.*, 1970, 397 U.S. 195. This distinction, while couched in terms of whether or not the dispute is "in" or "affecting commerce," stems more basically from the recognition that Congress, in passing legislation to govern domestic labor relations, "simply did not intend . . . to erase longstanding principles of comity and accommodation in international maritime trade." *Windward*, ante, 415 U.S. at 112-13.

If I understand it correctly, the court is willing to extend the NLRA to cover the present, secondary, dispute because the result reached "would portend no interference in the management or affairs of foreign companies, workers, or labor organizations;" indeed, will doubtless avert it. With due respect, I cannot agree. Either an act of Congress covers a particular dispute or it does not; the determination should not depend on the desirability of the ultimate result reached. It is, moreover, happenstance that the court can take this approach. Prior to the Taft-Hartley Act, the labor laws were held to protect secondary boycotts. *United States* v. *Hutcheson*, 1941, 312 U.S. 219. To say that defendants' conduct is a labor matter would then have meant it protected, with the inevitable effect upon the primary dispute. I cannot believe that we would then, given the proposition that the primary dispute involved longstanding principles of comity and accommodation in international maritime trade that Congress did not intend to erase, *Windward*, ante, have extended the act's protection to a secondary boycott designed very significantly to affect it. Equally, I do not believe that the fact that Congress came to have a

broader general view of the labor injunction should be taken to evince an intent for the NLRA to partake in international decisions.

Continuing with *Windward* and *Mobile,* these cases arose out of picketing of foreign-flag vessels by six American maritime unions in order to draw attention to the low wages paid by the vessels to their (foreign) crews—and the consequent competitive disadvantage of American shipping, which had to pay union scale. Longshoremen and other dock workers refused to cross the picket lines to load and unload the ships. Suit was brought, in the state courts,[1] by the foreign owners of two of the ships *(Windward)* and by American stevedores and an American shipper whose crops were waiting to be loaded *(Mobile).* In each case the unions sought to defeat the state court's jurisdiction as preempted by the NLRA. In *Windward,* the Supreme Court rejected the union's contention that their activity was covered by the Act, and protected, by section 7. In *Mobile,* the unions argued that whatever the case in a suit by the foreign shipowners, their activities vis-a-vis the American stevedores and shipper were governed by the NLRA, since they were arguably a secondary boycott prohibited by section 8(b)(4), which declares it an unfair labor practice for a labor organization or its agents

> "(1) to engage in, or to induce or encourage any individual employed by any person engaged in commerce . . . to engage in, . . . a refusal in the course of his employment to . . . handle . . . any goods . . . where . . . an object thereof is—
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> • • •

[1] *Windward* and *Mobile* were separate suits, in the courts of Texas and Alabama, respectively, arising out of factually identical activities by the unions in Houston and Mobile.

> (B) forcing or requiring any person . . . to cease doing business with any other person. . . ."

In rejecting this argument, the Court referred to its earlier holding in *Windward* that the picketing, insofar as it was designed to influence the foreign shippers' internal affairs, was not activity "affecting commerce," and stated

> "it would be wholly inconsistent to now hold, insofar as concerns Board jurisdiction over a complaint by respondents, that the employer of the longshoremen who honored the picket line, or the shipper whose goods they did not handle, was in or affecting commerce." 419 U.S. at 224.

Stating it differently, the court rejected "the proposition that a secondary employer's domestic business activities may be the basis for Board jurisdiction where the primary dispute is beyond its *statutory* authority over unfair labor practices 'affecting commerce,'" (emphasis in orig.) 419 U.S. at 226, and held the propriety, vel non, of the picketing not an NLRA matter.

Mobile, then, looks to the primary dispute: if this is beyond the Board's reach as not "affecting commerce," then so are secondary activities designed to influence its outcome. While this last may be semantically troublesome, it is fully consistent with the notion that the internal management or affairs of foreign entities are none of the Board's business, directly or indirectly. I therefore ascribe less importance than does the court to the *Mobile* Court's dictum that its holding "need cast no doubt on" the *Madden* and *Grain Elevator Workers* cases. 419 U.S. at 225 n.10. To my mind, *Mobile* casts considerable doubt on them. The only analytically significant distinction between these two cases and *Mobile* is that the former involved an actual work

stoppage to force the secondary employer not to deal with the primary, while the *Mobile* defendants induced such action by their secondary picketing. Where section 8(b)(4)(i) applies, it declares unlawful the engaging in, *or* the inducement or encouragement of, a secondary boycott. It is difficult to see how one affects "commerce" more than the other.

To summarize, it seems to me that in looking at the Act clause by clause, instead of as a whole, the court has adopted the approach of the *Mobile* dissent where, again, it was said that "following the literal language of § 8(b)(4)(B) and recognizing the Board's exclusion jurisdiction over the dispute would not in any way undermine the principles of comity emphasized in our decision in *Windward Shipping.*" 419 U.S., ante, at 241-42. That approach did not prevail in *Mobile,* and I would not follow it here. Accordingly I would hold that just as state court, rather than NLRA, jurisdiction existed in *Mobile,* plaintiff must look to our admiralty jurisdiction in the case at bar.

Nor do I find that wanting; the facts in the present case bear an intimate "relationship . . . to traditional maritime activity." *Executive Jet Aviation, Inc.* v. *Cleveland,* 1972, 409 U.S. 249, 261. *See Pino* v. *Protection Maritime Ins. Co.,* 1 Cir., 1979, 599 F.2d 10, 12-13, *cert. denied,* 444 U.S. 900; *Carroll* v. *Protection Maritime Ins. Co.,* 1 Cir., 1975, 512 F.2d 4, 6-9 and cases cited, particularly *O'Connor & Co.* v. *Pascagoula,* S.D.Miss., 1969, 304 F.Supp. 681; *Orient Mid-East Lines, Inc.* v. *Albert E. Bowen, Inc.,* S.D.N.Y., 1966, 255 F.Supp. 627; *Upper Lakes Shipping, Ltd.* v. *ILA,* S.D.N.Y., 1963, 33 F.R.D. 348. Having concluded that this action is not preempted by the NLRA, I would hold that Allied has properly alleged the elements of maritime tort for interference with its contractual relations.

Appendix A

Section 766A of the Restatement (Second) of Torts reads:

> "§ 766A. *Intentional Interference with Another's Performance of His Own Contract.* One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person, by preventing the other from performing the contract or causing his performance to be more expensive or burdensome, is subject to liability to the other for the liability to the other for the pecuniary loss resulting to him."

Most of the requisite elements are easily found in the case at bar and require little discussion. Contrary to ILA's assertion, malice in the sense of ill will need not be shown; intent (knowledge to a substantial certainty) is ordinarily enough. In the case of a remote interference, *see* post, the "motive or purpose" to interfere may be required. *See* Restatement, ante, § 766 comments j, r, s; § 766A comment e; § 767 comment d. However, it is reasonably clear that the ILA's purpose here was to prevent the loading and unloading of Russian and Russian-bound cargos—stated differently, to disrupt Soviet-American trade, of which Allied's contract represented a portion—and while the only ill will may have been directed toward the Soviet Union, the target of the boycott was this trade and, necessarily, this and other contracts. Allied has credibly alleged that it was prevented from or burdened in performing its contract,[2]

[2] The complaint recites that the contract under which the February shipment was made ran out on December 31, 1979, and that a new contract was under negotiation. If Allied has been hampered in the latter, Restatement § 766B (intentional interference with prospective contractual relation) might become relevant.

and has suffered pecuniary loss.[3]

A number of factors persuade me that the ILA's interference was "improper" within the meaning of section 766A.[4] Labor unions, under the protective wing of federal law, have achieved tremendous social and economic power. This is balanced, in labor controversies "in commerce," by protections given management and others—notably, the prohibitions of section 8(b). My conclusion that the secondary boycott provisions of section 8(b)(4) do not apply in no way detracts from the soundness of the general policy, embodied therein, of "shielding unoffending employers and others from pressures in controversies not their own." *NLRB* v. *Denver Building & Constr. Trades Council*, 1951, 341 U.S. 675, 692. As the court observes, a labor organization's secondary activity in pursuit of a political goal in no way related to the labor interests of its members may be thought doubly objectionable.

I am further influenced by the same "considerations of comity and accommodation in international trade" which argue against NLRA coverage. The ILA has sought ulti-

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[3] Damages may include lost profits as well as consequential losses. Restatement, ante, § 774A.

[4] Restatement § 767 presents a (nonexhaustive, *see* comment b) list of factors to be considered:

"(a) the nature of the actor's conduct,

(b) the actor's motive,

(c) the interests of the other with which the actor's conduct interferes,

(d) the interests sought to be advanced by the actor,

(e) the social interests in protecting the freedom of action of the actor and the contractual interests of the other,

(f) the proximity or remoteness of the actor's conduct to the interference and

(g) the relations between the parties."

mately to involve itself in the affairs of a foreign nation—a matter, in my opinion, better entrusted to the State Department than to labor unions. Union activity which unduly interferes with the non-"commerce" policies of a foreign entity is denied the protections of the NLRA, because such an intervention would be "likely to 'raise considerable disturbance not only in the field of maritime law but in our international relations as well.'" *Ariadne*, ante, 397 U.S. at 198, quoting *McCulloch* v. *Sociedad Nacional de Marineros*, 1963, 372 U.S. 10, 19. The protection of this interest alone might strain the limits of Allied's standing and this court's power. However, where we are asked to consider the propriety or impropriety of an injury done to a plaintiff properly before us, this concern diminishes "the social interest in protecting the freedom of action of the actor." Restatement, ante, § 767(c).

The ILA's argument that its boycott is too remote in its effect on Allied to be actionable is undercut by the fact that disruption of Soviet-American trade, of which Allied's business was a part, was not only a predictable and intended consequence of the boycott; it was the primary purpose behind it.[5] In such a case, "remoteness" of the type here is not a bar to recovery. *See* Restatement, ante, § 767 comment h.

Finally, I agree with the court's assessment of the ILA's First Amendment claim. While action may in some cases speak louder than words and receive similar protection, *see Spence* v. *Washington*, 1974, 418 U.S. 405, 409-10 (per curiam), at some point the concrete injury inflicted on others overshadows the expressive content inherent in the

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[5] This fact adequately distinguishes the ILA's cited cases of *Isbrandtsen Co.* v. *Local 1291, ILA*, 3 Cir., 1953, 204 F.2d 495 and *R.J. Caldwell Co.* v. *Fisk Rubber Co.*, 1 Cir., 1933, 62 F.2d 475.

act. If the First Amendment does not protect the inducement of a secondary boycott by picketing, *NLRB* v. *Retail Store Employees Union, Local 1001*, 48 U.S.L.W. 4796, 4798 (June 20, 1980), I do not see how it protects the boycott itself.

I would affirm the district court's dismissal of the NLRA and Sherman Act claims, and reverse its dismissal of the tort claim.

APPENDIX B

Decision of Administrative Law Judge Bernard Ries

JD-100-81
Boston, MA

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

DIVISION OF JUDGES

Case No. 1-CC-1753

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

and

LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

and

ALLIED INTERNATIONAL, INC.

John S. May, Esq., of Boston, MA, and *Joseph E. Mayer, Esq.,* of Washington, D.C. for the General Counsel.

Duane R. Batisti, Esq. (Nutter, McClennen & Fish), Boston, MA, for the Charging Party.

Herzl S. Eisenstadt, Esq. (Law Offices of *Thomas W. Gleason*), New York, NY, and *Joseph T. Doyle, Esq.,* of Boston, MA, for the Respondents.

Appendix B

Decision

Bernard Ries, Administrative Law Judge:

This matter was heard in Boston, Massachusetts, on August 27-28, 1980. It has two companion cases: *International Longshoremen's Association, AFL-CIO, et al. (Occidental Chemical Company)*, Cases Nos. 10-CC-1141-1, -2, -3 and -4, and *International Longshoremen's Association, AFL-CIO, et al. (Kansas Farm Bureau, American Farm Bureau Federation, Texas Farm Bureau)*, Cases Nos. 23-CC-762-1, -2, -3, -4, 23-CC-763-1, -2, -3, -4, and 23-CC-764-1, -2, -3, and -4, which were heard by the undersigned, respectively, on September 4-5, 1980, in Savannah, Georgia, and on October 27-28, 1980, in Houston, Texas.

The complaints in the three cases have a common theme—that Respondent International and various of its locals violated Section 8(b) (4) (i) (ii) (B) of the Act by announcing and implementing a boycott of Russian ships and cargo in the early part of 1980. Separate hearings were conducted, however, with the Charging Parties in each case confining their participation to the proceeding to which their charges had given rise. No motion having been made that the cases be consolidated for purposes of decision,[1] and since each of the Charging Parties has played a role in only the case of particular interest to it, I shall issue separate decisions in each case. Because of the commonality of many facts and issues in the three cases, reference will be made occasionally to arguments and circumstances in cases other than the present one.

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[1] Prior to the hearings, Respondents had moved that the three complaints be consolidated for hearing. Oppositions filed by the General Counsel and all the Charging Parties led the Associate Chief Administrative Law Judge to deny the motion.

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Briefs were received from the parties in all three cases on or about January 9, 1981. On the basis of the record made at the hearing,[2] my recollection of the demeanor of the witnesses, and the briefs, I make the following findings of fact, conclusions of law, and recommendation.

I. The Issues

On January 9, 1980,[3] two weeks after the invasion of Afghanistan by the Union of Soviet Socialist Republics, Respondent International President Thomas W. Gleason made the following public statement:

> In response to overwhelming demands by the rank and file members of the Union, the leadership of ILA today ordered immediate suspension in handling all Russian ships and all Russian cargoes in ports from Maine to Texas and Puerto Rico where ILA workers are employed.
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> This order is effective across the board on all vessels and all cargoes. Grain and other foods as well as high valued general freight. However, any Russian ship now in process of loading or discharging at a waterfront will be worked until completion.
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> The reason for this action should be apparent in light of international events that have affected relations between the U.S. and Soviet Union.
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> However, the decision by the Union was made necessary by the demands of the workers.

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[2] The transcript of the proceedings is hereby corrected as follows: at p. 9, l. 6, change "it's" to "as;" at p. 47, l. 23, change "we've" to "I've not;" at p. 218, l. 17, change "not" to "know;" at p. 229, l. 23, change "is not" to "not."

[3] All dates hereafter refer to 1980.

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It is their will to refuse to work Russian vessels and Russian cargoes under present conditions in the world.

People are upset and they refuse to continue the business as usual policy as long as the Russians insist on being international bully boys. It is a decision in which the Union leadership concurs.

The present complaint alleges that on or about January 9, President Gleason informed Charging Party Allied by telephone that the International would not unload the cargo of a ship carrying Russian goods at any United States port other than the port of Boston. It further alleges that on or about March 12, Respondent Local 799, through its agent Edward Connolly, informed Allied that it would not unload any cargo arriving from the USSR and that until further notice to the contrary was received from Respondent International, the Russian boycott would continue. It is further alleged that on or about March 25, Respondent International, by agents William Hankard and William McNamara, informed Allied that it would not unload any of Allied's cargoes originating in the USSR and that the boycott of such goods would continue until further notice from Respondent International. The conclusion of the complaint is that by the foregoing conduct, the Respondents have induced and encouraged individuals employed by or to be employed by various secondary employers to engage in strikes or refusals to handle goods or commodities and have thereby threatened, coerced, and restrained various secondary employers with an object of forcing the secondary employers to cease handling the products of, or doing business with, the Charging Party and other persons, and of forcing the Charging Party and other employers to cease

doing business with the USSR, or with other persons, all in violation of Section 8(b)(4)(i)(ii)(B) of the Act.[4]

II. Findings of Fact

Charging Party Allied International engages in the importation and sale of wood products. Most of the wood imported by Allied is from the USSR; in 1979, Allied purchased Russian wood valued at some 25 million dollars. The principal port of embarkation for the shipment of Russian wood is Leningrad, and the wood is regularly transported from that location to six American ports, including Boston.

Allied contracts with Waterman Steamship Lines, a New York corporation, to perform the carriage of Russian wood to the United States. Waterman employs three vessels of United States registry, the Walton, the Middleton, and the Jefferson, to transport the Russian wood to America; these three ships spend about three-fourths of their working life carrying goods from Russia to the United States.

Waterman contracts with the Boston firm of Peabody & Lane, Inc., as the ship's agent for its vessels in that port.

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[4] The cited provisions state, in relevant part:

> It shall be an unfair labor practice for a labor organization or its agents—. . . (4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: . . . (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . . .

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The stevedoring company employed by Waterman to unload ships in Boston is John T. Clark & Son of Boston, Inc. Clark is a member of the Boston Shipping Association, an employer organization which represents the four stevedoring companies in the port of Boston and which is party to a collective-bargaining agreement with Respondent international, Respondent Local 799, and two other ILA locals.

The bargaining agreement makes provision for the establishment of a hiring hall from which Clark obtains its longshore employees. The hiring hall has organized 12 permanent gangs used to load and unload ships, each gang consisting of 20 men. When a gang is incomplete, other individuals may be called to fill in the vacancies. According to John Murphy, an official of the Boston Shipping Association, in the course of a month, perhaps five fill-in employees per day are required. Some of the employees so used are nonunion employees ("scalawags"). While Murphy testified that he has seen as many as 25 nonunion employees present in the hall at one time, he has never heard of an entire gang composed of nonunion individuals. William Hankard, an international vice president of Respondent, also testified that in his 39 years of experience, he has never seen a ship unloaded by an entirely nonunion gang. Murphy testified that certain of the jobs, such as operation of the sling and the winch, are "very specialized" and require experience; Hankard said that while he has seen nonunion employees operating such equipment as forklifts and automobiles, he has not witnessed them operating other kinds of equipment on the docks.[5]

[5] Article 18 of the bargaining agreement provides, in part, "Extra-dock labor may be utilized to fill-out incomplete gangs working at that terminal and/or pier when no additional men required by the Employer are available at the Hiring Hall."

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On January 9, the day on which President Gleason issued his public statement, the Walton arrived in Boston and began discharging a portion of its cargo of Russian wood.[6] Reacting to Gleason's announcement, Edward Gildea, president of Allied, and Morton Waldfogel, Allied's treasurer, placed a telephone call to Gleason to ask him if he would permit the Walton to finish unloading in Boston and then to complete its schedule at the other three ports. Both Gildea and Waldfogel testified, without contradiction, that Gleason said that "he had to draw a line some place" and that while the Boston unloading would be completed, the Walton could be discharged at no other port.[7] The following day, Waterman cancelled the Walton's visit to the other three ports and, instead, discharged the remaining wood in Boston.

Due to the apprehension of Allied and Waterman that longshoremen would not unload Russian wood in any American ports, the Middleton, which was to arrive with a shipment of wood from Leningrad in late January, was diverted to Montreal, where it eventually unloaded its cargo, and the Jefferson, which was in Leningrad, apparently was forced to leave without carrying freight. In late January, because of the attendant uncertainties, Allied and the Russian agency with which it contracts renegotiated their agreements and reduced Allied's purchases of wood by a value of some 16 million dollars.

Allied President Gildea testified, without controversion, that on March 12 he called Edward Connolly, a business agent for Respondent Local 799, to determine whether anything had changed with regard to unloading a ship carrying

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[6] The remainder of the cargo was destined for Wilmington, North Carolina, Charleston, and Houston.

[7] It should be noted that, on cross-examination, Gildea testified that Gleason attributed the boycott decision to "the rank and file."

Russian wood in Boston.[8] Connolly said that he knew of no change and that if there was to be any, it would have to come from International Vice President Hankard. Connolly also stated that Hankard would have to check with President Gleason to ascertain whether ships could be handled in Boston.

John Kaires, a vice president of Allied, testified that he and others met on March 25 with Hankard and William McNamara, another vice president of the International Union. According to Kaires, when Hankard was asked whether the Union would handle Russian cargo in Boston, Hankard replied that the Union position had not changed, but that he would discuss with Gleason at a meeting scheduled to be held the following day in New York "the matter of the possibilities of handling Russian cargo in the port of Boston." Kaires stated that Hankard also said that "the local stevedores did what they were told to do." Hankard testified, and Kaires on rebuttal "absolutely" denied, that in his discussion with Kaires he had referred only to attempting to ascertain in New York whether there had been a change in the desires of the "rank and file" members about the boycott; he did not recall mentioning Gleason to Kaires. It is my belief, based on my impression of the witnesses and the circumstances, that Kaires' version of the conversation was closer to the truth.

It appears that, as of the date of hearing, Allied had been unable to transport Russian wood directly to the United States as a result of the boycott. Apparently, Waterman was only willing to transport cargo from Russia to Canada since the January events.

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[8] The U.S. District Court for the Southern District of Georgia had, on March 4, issued an injunction against the ILA boycott in the ports of Savannah and Brunswick.

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Respondents attempted here, as in the companion cases, to demonstrate that nonunion labor might have been obtained to work the Russian cargo. It seems fairly evident from the testimony that any such effort would have been unavailing. I doubt that a fully-trained gang of 20 nonunion employees could have been found to unload the Walton or the other vessels. I further note that even though Hankard testified that "employers have worked ships in the port of Boston when we've been on strike," he also testified that "scalawags" do not work ships when there is a strike going on because "the ship wouldn't be working."

Respondents undertook at the hearing the bootless task of establishing that Gleason's January statement was merely advisory, and, on brief, they attack "General Counsel's attempt to characterize President Gleason's statement as an 'order'." Since Gleason himself used that word twice in his announcement, and since he even defined the breadth of his directive to provide that loading or discharging currently being done "will be worked until completion," General Counsel's characterization hardly seems ill-founded. Plainly, Gleason intended the statement to be binding on members of the Union; plainly, Gleason intended that they understand it to be obligatory; and plainly, the Union officials who testified so understood it.

There is little support here, as in the other cases, for the related claim that Gleason's directive merely expressed the overwhelming desire of the membership. Hankard did testify, without contradiction, that only a few hours before Gleason's announcement on January 9, he received a call that longshoremen working a ship at Castle Island wanted to leave work because of the Russian cargo they were handling. Hankard said that he went to the ship and quelled the rebellion, and the men continued to perform their work. He also testified, however, that prior to Gleason's state-

ment, he had received no indication of a groundswell for a Russian boycott from any of the eight ports under his jurisdiction. Gleason did not appear in any of these hearings to give testimony about a flood of sentiment pouring in on him from ILA members throughout the nation, and I am inclined to believe that he was not so inundated.[9]

III. Jurisdiction

At the threshold, Respondents interpose a challenge to the assertion of Board jurisdiction in these cases. Relying on a line of opinions issued by the Supreme Court between 1957 and 1974, Respondents contend that the present disputes are not in "commerce" and are therefore beyond the jurisdictional reach of the Labor Board. That the issue presented is a difficult one and that Respondents' contention is respectable can hardly be gainsaid; only recently, faced with the same claim arising out of this very controversy, the Court of Appeals for the Fifth Circuit, construing the Supreme Court precedents, has concluded that the Board is without jurisdiction of this matter, and a divided panel

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[9] As set out hereafter, I have concluded that the complaints in all three companion cases should be dismissed for want of jurisdiction. I shall include the legal discussion of this point only in the instant decision.

Because the relevant facts of the other two cases differ somewhat from the present factual setting, I note that in *Occidental Chemical Company*, the evidence showed that in Savannah, in the aftermath of President Gleason's directive, an ILA local president confirmed that his local would not handle a foreign-flag ship carrying Russian ammonia purchased by Occidental, and a similar incident occurred in Brunswick, where another ILA local president refused to furnish longshoremen for a vessel, perhaps British-owned and perhaps under Liberian registry, bringing Russian potash bought by Occidental; and in *Kansas Farm Bureau*, the testimony established that in Houston, the presidents of two ILA locals indicated that they would not supply longshoremen so that a Russian-chartered Belgian ship could load grain being purchased by the USSR from an American grain dealer.

of the Court of Appeals for the First Circuit has effectively held to the contrary. In these circumstances, it is appropriate to consider in some detail the Supreme Court authorities whose contours are thus drawn into question.

A. *The Supreme Court Cases*

The line began with *Benz et al.* v. *Compania Naviera Hidalgo, S.A.*, 353 US 138. A foreign-owned ship, sailing under a foreign flag, was struck by its foreign-national crew while temporarily in the harbor at Portland, Oregon. Three American unions picketed in support of the crew. The shipowner filed under state law for injunctive relief and damages against the unions. The issue presented to the Supreme Court was whether the Labor Management Relations Act preempted the field so as to leave the trial court without jurisdiction.

The Supreme Court concluded, after review of the legislative history of the Act, that Congress was concerned only with "industrial strife between American employers and employees." Deducing that Congress had no specific intention to make the Act applicable to other than domestic disputes, the Court stated:

> The seamen agreed in Germany to work on the foreign ship under British articles. We cannot read into the Labor Management Relations Act an intent to change the contractual provisions made by these parties. For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.

The effect of the ruling was to uphold the award of damages by the lower court under Oregon law against representatives of the unions.

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Six years later, the Court decided *McCulloch*[10] and *Incres*.[11] In *McCulloch*, the Supreme Court rebuffed an effort by the Board to hold a representation election among the seamen on certain Honduran-flag vessels which had points of contact with the United States, including ultimate ownership by an American company. The Court adhered to its belief earlier expressed in *Benz* that Congress had failed to give any indication that the Act contemplated Board jurisdiction over "maritime operations of foreign-flag ships employing alien seamen." It noted, in addition, the established rule of international law that the law of the flag state ordinarily governs the internal affairs of the ship; and that, in the case before it, the employees were already represented by another union certified under Honduran law. The Court raised the possibility that sanctioning Board jurisdiction might lead the Board to inquire into the "internal discipline and order of all foreign vessels calling at American ports," which activity "would raise considerable disturbance not only in the field of maritime law but in our international relations as well." It further foresaw "questions of such international import [that] would remain as to invite retaliatory action from other nations as well as Honduras." The Court concluded, as it had in *Benz*, that it would not divine that Congress had in fact exercised such authority in this "delicate field of international relations . . . [without] the affirmative intention of the Congress clearly expressed."

In *Incres*, an American union attempted to organize foreign seamen on two foreign-owned, and foreign-flag,

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[10] *Frank W. McCulloch, Chairman* v. *Sociedad Nacional de Marineros de Honduras*, 372 US 10.

[11] *Incres Steam Ship Company, Ltd.* v. *International Maritime Workers Union, et al.*, 372 US 24.

ships. They picketed the ships, and the foreign shipowner brought an action in the New York courts for damages and injunctive relief. The New York Court of Appeals held that state court jurisdiction was preempted. The Supreme Court reversed, applying the holding of *McCulloch* that "the Act had no application to the operations of foreign-flag ships employing alien crews," and for the first time linking this construction of the Act to the statutory provisions which define the terms "commerce" and "affecting commerce." [12] In the instant case, said the Court, "[T]he IMWU's activities are directly related to Incres' employer-employee relationship, since the very purpose of those activities was the organization of alien seamen on Incres' vessels." The holding below was vacated so that the New York courts might assert jurisdiction.

International Longshoremen's Local 1416, AFL-CIO v. *Ariadne Shipping Company, Ltd., et al.*, 397 US 195, was the next Supreme Court case construing the *Benz* doctrine and the only one thus far to hold that the Act affords pre-

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[12] Section 10(a) provides that the Board is empowered to prevent any person from engaging in any unfair labor practice "affecting commerce." Section 2(6) states:

> The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

Section 2(7) provides:

> The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

emptive jurisdiction over acitvities relating to a foreign-flag vessel. The case involved two foreign-owned, foreign-flag, cruise ships which operated between Florida ports and the Caribbean. When the ships were in American ports, they engaged some American longshoremen to do loading work. An American union picketed the vessels with placards protesting that the longshore work was being done under substandard wage conditions. The Florida courts granted injunctive relief to the foreign shipowners.

The Supreme Court thought that this case differed sufficiently from the ones previously decided so as to permit a conclusion that Congress would have desired that the Board assert jurisdiction in these circumstances. This was not a situation in which Board regulation of the aspect of labor relations in question would necessitate inquiry into the "internal discipline and order" of a foreign vessel which might "raise considerable disturbance not only in the field of maritime law but in our international relations as well." Unlike the prior three cases, invocation of Board jurisdiction in *Ariadne* would not likely provoke "vigorous protests from foreign governments and . . . international problems for our government," or "invite retaliatory action from other nations." Nor was there any showing that such assertion of jurisdiction would depart from "the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship." The Court, holding that the "longshore activities of such American residents" were not within the exempted area marked out by *Benz* and its progeny, stated:

> [T]his dispute centers on the wages to be paid American residents, who were employed by each foreign ship not to serve as members of its crew but rather to

> do casual longshore work. There is no evidence that these occasional workers were involved in any internal affairs of either ship which would be governed by foreign law. [Footnote omitted.] They were American residents, hired to work exclusively on American docks as longshoremen, not as seamen on respondents' vessels.

Concluding that "application of United States law to resolve a dispute over the wages paid the men for their longshore work, accordingly, would have threatened no interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law," the Court held that "these longshore operations were in 'commerce' within the meaning of" the Act and that, since the picketing was arguably protected by the Act, Florida law was accordingly preempted.

Four years later, in 1974, the Court decided *Windward Shipping (London) Limited, et al.* v. *American Radio Association, AFL-CIO, et al.*, 415 US 104. In that case, several American maritime unions, concerned about the loss of jobs available to their members, agreed to take collective action against foreign vessels which they perceived as a principal cause of the situation. They picketed two foreign-owned vessels in Houston with signs calling attention to the substandard wages paid to the foreign crews and the consequent plight of American seamen.[13] The effect of the picket-

[13] The signs read:

> Attention To The Public
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> The Wages and Benefits Paid Seamen Aboard The Vessel Theomana [Northwind] Are Substandard To Those of American Seamen. This Results In Extreme Damage To Our Wage Standards And Loss To [sic] Our Jobs. Please Do Not Patronize This Vessel. Help The American Seamen. We Have No Dispute With Any Other Vessel On This Site.

ing was to cause longshoremen and other port workers to refuse to cross the picket lines. The shipowner sought injunctive relief in a Texas court. The Texas Court of Appeals held that the picketing did not interfere with the "maritime operations of foreign-flag ships" under the *McCulloch* standard and that the activity was arguably protected under Section 7 of the NLRA; accordingly, that court denied the request for injunction.

In reviewing *Benz* in *Windward*, the Supreme Court attributed its result not only to the "clear Congressional purpose to apply the LMRA only to American workers and employers," but also to reluctance on the part of the Court "to intrude domestic labor law willynilly into the complex of considerations affecting foreign trade." It further characterized *Benz* and the other cases which had denied jurisdiction to the Labor Board as recognition that "Congress, when it used the words 'in commerce' in the Labor Management Relations Act, simply did not intend that Act to erase longstanding principles of comity and accommodation in international maritime trade." The Court went on to acknowledge that the picketing activities in the case before it did not involve the "inescapable intrusion" into the affairs of foreign ships that was present in *Benz* and *Incres*, since neither the representation of the foreign crews nor support for such crews in their own wage disputes was implicated. However, the Court said, "[T]hose cases do not purport to fully delineate the threshold of interference with the maritime operations of foreign vessels which makes the LMRA inapplicable." In explaining why that threshold was crossed on the facts before it, the Court stated:

> The picket signs utilized at the docks where the North Wind and Theomana were tied up protested the wages

paid to foreign seamen who were employed by foreign shipowners under contracts made outside the United States. At the very least, the picketers must have hoped to exert sufficient pressure so that foreign vessels would be forced to raise their operating costs to levels comparable to those of American shippers, either because of lost cargo resulting from the longshoremen's refusal to load or unload the vessels, or because of wage increases awarded as a virtual self-imposed tariff to regain entry to American ports. Such a large scale increase in operating costs would have more than a negligible impact on the "maritime operations" of those foreign ships and the effect would be by no means limited to costs incurred while in American ports. Unlike *Ariadne*, the protest here could not be accommodated by a wage decision on the part of the shipowners which would affect only wages paid within this country.

In this situation, the foreign vessels' lot is not a happy one. A decision by the foreign owners to raise foreign seamen's wages to a level mollifying the American pickets would have the most significant and far-reaching effect on the maritime operations of these ships throughout the world. A decision to boycott American ports in order to avoid the difficulties induced by the picketing would be detrimental not only to the private balance sheets of the foreign shipowners but to citizenry of a country as dependent on goods carried in foreign bottoms as is ours. Retaliatory action against American vessels in foreign ports might likewise be considered, but the employment of such tactics would probably exacerbate and broaden the present dispute. Virtually none of the predictable re-

sponses of a foreign shipowner to picketing of this type, therefore, would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate. This case, therefore, falls under *Benz* rather than under *Ariadne*. [Footnote omitted.]

Justice Brennan, joined by Justices Douglas and Marshall, dissented. The dissent construed the majority opinion as holding that the Act did not apply simply "because the *economic impact* upon foreign shipping from respondents' picketing might severely disrupt the maritime operations of foreign vessels," and the dissent contended that in fact the prior cases rested squarely upon quite different, and more limited, criteria—that Congress would have disapproved exercise of jurisdiction only over those cases which allowed "Board cognizance of a dispute [which] will necessarily involve Board inquiry into the *labor relations* between foreign crews and foreign vessels." (Emphases in original.) Justice Brennan argued that, under the precedents, the only appropriate issue is whether "NLRB cognizance of respondents' picketing would require that the Board 'inquire into the internal discipline and order' of foreign vessels," and that, under such a test, *Ariadne* would apply here. He also believed that the question of whether the dispute could be accommodated "by a wage decision on the part of the shipowners which would affect only wages paid within this country" was irrelevant because the picketing was not in fact "directed at forcing the shipowner to make that or any other accommodation that could be characterized as interference with relations between crew and shipowners. Respondents' target is to persuade shippers not to patronize foreign vessels, and respondents have no

concern with the form of the shipowner's response that makes their efforts succeed." Justice Brennan went on to point out that the unions' effort to foster use of domestic shipping was entirely consistent with national policies in the maritime field and found it most unlikely that Congress was satisfied to allow the states to resolve the problem, saying, "It is inconceivable that Congress meant to leave regulation of activity in this area of predominantly national concern to disparate state laws reflecting parochial interests."

Later in 1974, the Court was again confronted with a legal issue arising out of the same picketing campaign which had resulted in the *Windward* decision. In *American Radio Association, AFL-CIO, et al.* v. *Mobile Steamship Association, Inc., et al.*, 419 US 215, the unions which had participated in the picketing in the *Windward* case engaged in similar conduct at another port, directed against another foreign ship. The legal posture of the case, however, was different. Whereas in *Windward* the plaintiff in the Texas court had been the shipowner, in *Mobile* the plaintiffs seeking an injunction in the Alabama court were the stevedoring companies which had desired to service the picketed ships and the shippers who had wished to have their crops loaded onto it. In *Windward,* the petitioning unions, seeking to assert Federal preemption, had contended that their Houston picketing was protected under Section 7 of the Act. The same unions contended in *Mobile* that, with respect to the effect of their conduct on the stevedores and the shippers, such conduct arguably constituted a secondary boycott prohibited by Section 8(b)(4) of the Act. The unions attempted, in other words, to persuade the Court that an independent controversy existed between them and the stevedoring and shipping companies which was subject

to the jurisdiction of the Board, despite the fact that the dispute between the unions and the shipowner was not.

The Court majority found anomalous the claim that a state court might have jurisdiction over a complaint filed by a foreign shipowner but would be ousted of jurisdiction when the stevedore with whom the shipowner would have dealt itself sought an injunction against the union for conduct arising out of the same dispute. The majority did not "believe . . . that the line of cases commencing with *Benz* and culminating in *Windward* permit such a bifurcated view of the effects of a single group of pickets at a single site."

The majority noted its previous reference in *Windward* to the effect of the picketing on secondary employers ("lost cargo resulting from the longshoremen's refusal to load or unload the vessels") and the recognition there that the effect of picketing on the "maritime operations of foreign ships" would be produced in large part by the refusal of the American workmen employed by domestic stevedoring companies to cross the picket line in order to load and unload cargo. Such a conclusion, the Court stated in *Mobile*, "inevitably flows from the fact that the response of the employees of the American stevedores was a crucial part of the mechanism by which the maritime operations of the foreign ships were to be affected." It followed, therefore, that "the fact that the jurisdiction of the state courts in this case is invoked by stevedores and shippers does not convert into 'commerce' activities which plainly were not such in *Windward*." In summary, the Court concluded:

> Here, neither the farmer seeking to ship his soybeans, the stevedores who contracted to unload the cargo of the foreign-flag vessel, nor the longshoremen whom

> the stevedores employed to carry out this undertaking, were for these purposes engaged in or affecting commerce within the purview of the National Labor Relations Act. Therefore the petitioners' picketing did not even "arguably" violate §8(b)(4) of the Act. Since Congress did not intend to strain through the filament of the NLRA picketing activities which so directly affect the maritime operations of foreign vessels, we hold that the Alabama courts were competent to apply their own law . . . .

Three members of the Court joined Justice Stewart in dissent. In the view of the dissenters, a substantial difference existed between the issue of "jurisdiction over a dispute between the owners of foreign-flag vessels and American maritime unions" (*Windward*) and "whether state courts have jurisdiction over a complaint by an association of American stevedoring companies that secondary pressure caused by the picketing of American maritime unions constituted a wrongful interference with the American companies' right to carry on their lawful business." The gravamen of the latter complaint, argued the dissent, "is precisely the type of concerted activity made subject to Board regulation by § 8(b)(4)(B) of the LMRA. . . ." If, as in *Ariadne, supra,* it was true that the longshoremen serving foreign-flag vessels are indeed in "commerce" and thus subject to the regulatory power of the Board, their employers must similarly be "engaged in commerce or in an industry affecting commerce" within the meaning of Section 8(b)(4)(B). On the assumption that the majority of the Court would allow the Board to exercise jurisdiction over the secondary aspect of the case had the unions been involved in a primary dispute with American-flag ship-

owners, Justice Stewart found anomalous that the Section 8(b)(4)(B) jurisdictional requirement should depend "entirely on whether in a particular case a primary labor dispute to which the stevedoring company was not privy was between an American union and an American-flag shipowner or an American union and a foreign-flag shipowner."

The dissent perceived no considerations of comity, no intrusion of domestic labor law into foreign trade, and no thrusting of the Labor Board into the delicate field of international relations, by holding that the Board had exclusive jurisdiction over the alleged secondary conduct in the case at hand: "Certainly a Board decision that secondary pressure violated § 8(b)(4)(B) would not risk interference with international maritime trade. Nor would a decision that the secondary pressure did not violate Section 8(b)(4)(B) endanger the foreign-flag shipowners' interests in preserving the integrity of their maritime operations from the impact of the unions' picketing. These interests are fully protected under *Windward Shipping* by permitting the foreign shipowner to seek an injunction in state court."

In arguing that the primary and secondary aspects of the unions' conduct were legally separable for purposes of jurisdiction, Justice Stewart noted that the only two Courts of Appeals that appeared to have addressed the question "have also sustained Board jurisdiction over secondary disputes involving American employers and unions despite the fact that the primary dispute involved foreign-flag vessels," citing *Madden* v. *Grain Elevator, Flour and Feed Mill Workers, International Longshoremen Assn., Local 418*, 334 F.2d 1014 (C. A. 7), and *Grain Elevator, Flour and Feed Mill Workers, International Longshoremen Assn., Local 418* v. *NLRB*, 376 F.2d 774 (C. A. D.C.). Those two cases arose out of the same controversy. A Canadian union

was involved in a labor dispute with a Canadian shipping company. In order to support the Canadian union in that dispute, an American union which represented employees of an American grain shipper induced its members at an American port to cease loading the American employer's grain onto ships owned by the Canadian employer. In both cases, the Courts of Appeal tersely rejected the contention that the Board, by virtue of *Benz* and *Incres*, lacked jurisdiction over the American union's conduct in this country. The *Madden* Court stated succinctly (334 F.2d at 1019):

> [N]o attempt is being made to regulate or to apply the Act to the "internal management or affairs" of the Upper Lakes ships; the injunction does not regulate the internal affairs of its ship. No conflict between American and Canadian policies can result from halting an illegal secondary boycott in this country, directed against an American employer by an American labor organization and involving employees working in a domestic plant of the American employer.

In evident response to the citation of the *Grain Workers* cases by the *Mobile* dissent, the *Mobile* majority appended the following footnote to its textual conclusion that "[t]he fact that the jurisdiction of the state courts in this case is invoked by stevedores and shippers does not convert into 'commerce' activities which plainly were not such in *Windward*":

> In so holding, we need cast no doubt on those cases which hold that the Board has jurisdiction under Section 8(b)(4) of domestic secondary activities which are in commerce, even though the primary employer is

located outside the United States. See [the *Grain Workers* cases].

B. *Discussion*

In assessing the applicability of the *Benz-Mobile* doctrine to the instant boycott, two discrete questions may require decision. The first issue is the reach of the *Benz-Windward* line—what are its metes and bounds, what are the pertinent criteria in testing whether union conduct is not in "commerce" so as to deprive the Labor Board of jurisdiction over it. The second question which would arise, in the event of a conclusion that the "primary" dispute here might be considered, under the theories propounded in *Benz-Windward,* beyond the Board's supervisory power, is whether the dispute may nonetheless be subject to Board regulation because of its secondary character, being, it is argued, less like *Mobile* than like the *Grain Workers* cases apparently approved by the *Mobile* Court.

It should be noted that from the point of view of the Respondents and the Charging Parties, the real, practical, essential issue appears to be a narrow one: the choice of forum in which relief will be sought. As the cases reviewed above indicate, a holding that the Board is without jurisdiction leaves those parties which feel aggrieved by the respondents' conduct the alternative of pursuing state court remedies; the cases also suggest that state law may often be more hospitable to claims against unions than the NLRA would be. However, although the pragmatic stakes in the present cases may not be as consequential as the considerable litigation to which the dispute has given rise might suggest, the proper application of the Supreme Court doctrine is an analytical challenge of the first water.

Appendix B

1. The Applicability of *Benz-Windward* (Without Regard to *Mobile*).

Long before *Benz*, it had been accepted that Congress is capable of applying American law to foreign ships voluntarily entering American territorial limits. *Wildenhus's Case*, 120 U.S. 1. Furthermore, it has been said that the "commerce" jurisdiction of the Labor Board is a broad grant by Congress of "the full sweep of its constitutional authority." *Polish National Alliance* v. *NLRB*, 322 U.S. 643, 647. The question in the foreign-flag cases has always been whether it may nonetheless fairly be inferred that Congress, for considerations of national and international importance, intended to impose limitations on the Board's jurisdiction in particular circumstances.

The first cases in this line were much of a piece. It may reasonably be said that *Benz*, *Incres*, and *McCulloch* all concerned efforts by American unions to involve themselves in the labor relations of foreign vessels, with no apparent resultant benefit to American workingmen. The Supreme Court was of the view that in the absence of any expression of affirmative intention, it was inappropriate for the Court to conclude that Congress desired the Court "to run interference in such a delicate field of international relations" "where the possibilities of international discord are so evident and retaliative action so certain." *Benz*, 353 U.S. at 147.[14]

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[14] The repeatedly expressed fear in these cases of disrupting international relations and offending principles of comity does not specifically deal with two factors which seem to make these concerns less threatening. One is that, in all of the cases except *McCulloch*, the only apparent role which the Board might have played, on the facts in each case, would have been the potential issuance or withholding of an injunction against the picketing American union. I am uncertain how the entry of such an order,

In *Windward*, however, the doctrine seemed to take a new tack. Justice Brennan argued in dissent that while the earlier cases had refused to permit "Board cognizance of a dispute [which] will necessarily involve Board inquiry into the *labor relations* between foreign crews and foreign vessels," the majority view in *Windward* was withholding Board jurisdiction "because the *economic impact* upon foreign shipping from respondents' picketing might severely disrupt the maritime operations of foreign vessels." 415 U.S. at 118 (emphasis in original). The *Windward* majority seemed to agree that it was engaging in an expansion of the prior cases, conceding that the picketing before it did not "involve the inescapable intrusion into the affairs of foreign ships that was present in *Benz* and *Incres*," but holding that those cases "do not purport to fully delineate the threshold of interference with the maritime operations of foreign vessels which makes the LMRA inapplicable." *Id.* at 114.[15]

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or the failure to enter one, would necessarily constitute a direct intrusion into international affairs. Furthermore, the issue in each case, except *McCulloch*, was whether state law was preempted by the Labor Act. The decisions in *Benz*, *Incres*, *Windward*, and *Mobile* that state laws could be applied would seem to present at least the same threat of international disruption that Board jurisdiction would foretell.

[15] It may be wondered why the majority chose to agree that *Windward* was a somewhat different breed of cat than the prior cases, and to engage in speculation about the economic implications of the picketing there. At least superficially in *Windward*, it might have been said that the American picketing which complained of substandard foreign wages was certainly as intrusive into the foreign employer-employee relationship as was the *Benz* picketing which offered American support to a strike by a foreign crew against its foreign employer; the *Benz* language about exempting from Board jurisdiction an attempt "to change the contractual provisions made by these [foreign] parties," 353 U.S. at 146-147, it would seem, would have fit the *Windward* facts with

Windward thus seemingly broadened the *Benz* principle, at two levels. In addition to conduct or situations which threatened to constitute potential intrusion into foreign labor relations, the *Windward* mode of analysis seemed to remove from Board jurisdiction the regulation of conduct which promised a substantial adverse economic effect upon foreign trade. And, by so expanding the inquiry, the issue no longer focussed on the effect of "Board cognizance of a dispute," or whether the exercise of Board jurisdiction "would require the Board to examine into" foreign labor relations, or whether assertin of Board jurisdiction "would necessitate Board inquiry into the relations" (all the words of dissenting Justice Brennan in analyzing, in *Windward*, the prior cases); the majority rationale in *Windward* spoke only in terms of the potential economic effects of the picketing activities there.

As discussed by the *Windward* majority, there seem to be two principal determinants of whether a *Windward* situation is present: the objective of the union and the predictable impact of its conduct. Thus, the Court stated that "[a]t the very least," the union "must have hoped" to cause the foreign vessels to raise their operating costs, either as a result of losing revenue or of capitulating to the picketing by increasing the wages of the foreign seamen. The end thus presumably desired by the union would have a "more than negligible" impact of the maritime operations of the ships, and could not be "accommodated by a wage decision on the part of the shipowners which would affect only

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a fair degree of comfort. One might assume that the Court refrained from such a mechanical analysis because it perceived that the picketing had a principal objective of shutting out foreign vessels rather than merely making them competitive with the domestic fleet.

wages paid within this country." Further, a decision by the shipowners to increase their seamen's wages would have "the most significant and far-reaching effect on the maritime operations of these ships throughout the world;" absent such a decision, the alternative choice by the shipowners of boycotting American ports "would be detrimental not only to the private balance sheets of the foreign shipowners but to citizenry of a country as dependent on goods carried in foreign bottoms as in ours," bringing, in addition, the threat of "[r]etaliatory action against American vessels in foreign ports" which would "probably exacerbate and broaden the present dispute."

In concluding its analysis, the Court arguably applied a test somewhat less expansive in tone than that connoted by the speculative auguries previously set out, and if the twice-used word "therefore" were to be given its full weight, the test might be said to be both clear and exclusive: "Virtually none of the predictable responses of a foreign shipowner to picketing of this type, therefore, would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate. This case, therefore, falls under *Benz* rather than under *Ariadne*."

In the present cases, the president of Respondent International issued a directive to Union members to suspend the handling of "all Russian ships and all Russian cargoes" in American ports, and subordinate Union officials complied with his order. As in *Windward*, "[a]t the very least" the Respondent Union "must have hoped" to make the use of Russian ships and the carrying of Russian cargo disadvantageous and counterproductive; at the ultimate, as assuredly was also the case in *Windward*, the Union here sought to bring an end to the use of such ships and the

transport of such cargo.[16] Like *Windward*, the end result of the Union conduct, if successful, threatened "more than a negligible impact" on the maritime operations of foreign ships and on the business of foreign entities engaged in Russian trade.

As in *Windward*, "the protest here could not be accommodated by a wage decision on the part of the shipowners which would affect only wages paid within this country;" the only decision which would mollify Respondents "would have the most significant and far-reaching effect" on the operations of Russian shipowners (i.e., the Soviet government) and on Russian purveyors and purchasers of goods (i.e., the Soviet government); a determination by the Russian authorities to boycott American ports rather than withdraw from Afghanistan "would be detrimental not only to the private balance sheets of the foreign shipowners but to citizenry of a country as dependent on goods carried in foreign bottoms as ours;" "[r]etaliatory action against American vessels in [Russian] ports" might follow, which would "probably exacerbate and broaden the present dispute;" and finally, none of the "predictable responses" to the Respondents' conduct "would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate"—indeed, in the present case, the Respondents sought no economic advantage or benefit for its members by the conduct in which they engaged.

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[16] The pickets in *Windward*, as earlier noted, complained of substandard foreign wages which resulted in "extreme damage to our wage standards and loss to [sic] our jobs," and asked the public to "not patronize this vessel" and to "help the American seamen." The objective of the picketing was, in one way or another, to cause a diminution in the use of foreign vessels and an increase in the use of American ships and crews.

Appendix B

After thus parsing, and then tracking, the components upon which *Windward* relied in concluding that the Board was without jurisdiction, it seems to me difficult to reach a different result in the present case. There are, very obviously, factual variations, but I cannot, in laying them next to the *Windward* language, perceive those differences as significant ones. It may seem to me that there would have been a greater theoretical chance for the American unions in *Windward* to have achieved a wage objective (although it is not easy to say that they were doing anything other than attempting to put the foreign ships out of business) than for the present Respondents to have caused the Russian government to withdraw from Afghanistan, but it may certainly be said that the sort of international reverberations about which the Court speculated in *Windward* can equally be conjectured here.

And, of course, none of the "predictable responses" to the present conduct "would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate." The Respondents' actions were entirely unrelated to the advancement of the interests customarily served by unions; they were wholly "political" in nature, and in fact detrimental to the immediate interests of longshoremen, by causing a reduction in the work available to them. It would seem a curious thing to hold that a union is *not* involved in "commerce," and not subject to Board jurisdiction, when, as in *Windward,* it pursues a labor-oriented objective, beneficial to its members, by traditional union methods which promise to have an impact upon foreign trade, but *is* in "commerce", and therefore within Board jurisdiction, when it pursues a non-labor-oriented objective by similar methods which promise to have a similar impact.

This latter reasoning appealed to the Court of Appeals for the Fifth Circuit, which held, in *Baldovin* v. *International Longshoremen's Association, AFL-CIO, et al.*, 626 F.2d 445, that the conduct presently under consideration was not in "commerce" within the meaning of the *Benz* family of cases. In *Baldovin*, the Court was considering consolidated appeals from a District Court decision denying a Section 10(1) injunction sought by the Board Regional Director in Houston (here the *Kansas Farm Bureau* case) and from another District Court decision granting such an injunction in Savannah and New Brunswick (presently the *Occidental* case). In concluding that there was not even "reasonable cause" to believe that the Union had violated Section 8(b)(4), the Court reasoned as follows (*id.* at 450-454):

> As we have seen, however, the secondary boycott prohibition was designed to narrow the labor controversy into a confrontation between the primary opponents. If one of those opponents is not subject to the NLRA, for example, because it is a foreign entity or a foreign nation, and if the objective of the union is to obtain concessions of a kind that could not be achieved either by domestic action or by labor disputes of the kind encompassed by the NLRA, the boycott ban would be merely a prohibition devoid of its function. Seeking to restore the secondary boycott provisions to their purpose, the Supreme Court has interpreted the commerce provisions in the statute to import two separate purposes: they set forth the basis for congressional action and the limitation on that action in accordance with constitutional concepts traditionally incorporated by those terms; in addition they limit the

statutory scope of the secondary boycott provisions to those boycotts that could be remedied by domestic action.

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The Board's recent decision in *National Maritime Union of America and Shippers Stevedoring Company*, 245 NLRB No. 29 (1979), is based on the *Windward-Mobile* rationale. In *Shippers Stevedoring* a union representing United States seamen picketed a U.S.S.R. flag ship with signs protesting the use of U.S.S.R. vessels, instead of United States ships, to transport foreign cargo purchased with United States tax dollars in violation of the Cargo Preference Act, 46 U.S.C. § 1241(b)(1). Because the picketing was aimed at replacing the foreign ship and its foreign crew with a United States ship and a United States crew, the Board viewed the picketing as directly affecting the "maritime operations" of the foreign ships. Therefore, the Board found the picketing activities to be not "in commerce" within the meaning of the LMRA.

The Board itself recognized in *Shippers Stevedoring* that the *Windward-Mobile* rationale cannot be confined to union efforts directed toward changing shipboard conditions of employment. The union that was picketing in *Shippers Stevedoring* could not be mollified by a change in shipboard wages or employment conditions, nor would a wage-cost adjustment by the shipowner end the dispute. The Board adopted as the touchstone for determining whether a particular activity affects commerce the foreignness of the objective of those engaged in the activity and the degree of intrusion into the affairs of the foreign entity which will be brought

about by the entity's response to the activity in question.[17]

* * *

These union activities, a political protest against the political actions of a foreign government, in comparison with the union activities in *Windward* and *Mobile*, are even further removed from the type of domestic labor relations that the Act was intended to cover. *Windward* and *Mobile* cannot be distinguished on the basis of the purely factual differences that the unions were there conducting "area standards" picketing directly against the foreign ships, the unions had a primary labor dispute with the foreign ships and the picketing of the vessels was designed to affect directly the internal labor relations of the foreign ships vis-a-vis their foreign crews. [Footnote omitted.]

In *Windward* as here the union objective was to compel a foreign entity to change a course of action it was taking away from our shores. If the fact that the present dispute is with a foreign government over military policy makes the activity in commerce, while a dispute with a foreign employer over its labor policy would not be in commerce, then the anomalous result would be that an injunction could not issue when labor relations are involved but could issue when they are not.

The mere fact that a boycott or picketing is aimed at a foreign entity does not, of course, *ipso facto* preclude NLRB jurisdiction. [Footnote omitted.] The object of the dispute determines whether or not it is "in commerce." When the dispute is over the hiring of American labor in United States ports, it is "in commerce." When the dispute is over the foreign ves-

[17] *Shippers Stevedoring* will be discussed in greater detail *infra*.

sels' relations with its foreign employees, it is not "in commerce." When the dispute is over a foreign government's invasion of a remote nation, it is more emphatically not "in commerce."

As in *Windward* and *Mobile*, the ILA's activities are outside the coverage of the Act because of the nature of the reasonable responses that would accommodate the union's complaint. Only a political decision on the part of a foreign government can satisfy the ILA's grievance. Thus, the *Windward* rationale as recognized by the Board in *Shippers Stevedoring* compels a finding that the ILA activities do not come within the coverage of the Act. [Footnote omitted.]

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The Supreme Court decisions whose lead we follow were reached by divided courts but they read the LMRA as drawing a domestic-foreign impact line that permits domestic unions to boycott foreign vessels with the purpose of attempting to affect foreign affairs. We attempt but to interpret the congressional intent. If we fail to recognize it, the remedy lies in the hands of Congress.

It is not unmistakably clear that the secondary boycott provision is only "designed to narrow the labor controversy into a confrontation between the primary opponents," or that the provision would be "a prohibition devoid of its function" when applied to a dispute in which the one of the opponents is not subject to the NLRB and the subject of the dispute is incapable of domestic resolution. It has been held that the secondary boycott prohibition is intended principally to protect neutral employers and may apply despite the absence of a conventional primary dispute. E.g.,

National Maritime Union of America, AFL-CIO v. *NLRB*, 346 F.2d 411, 418 (C.A.D.C.). In its principal thrust, however, the Fifth Circuit reads, and approves, *Shippers Stevedoring* as adopting "as the touchstone for determining whether a particular activity affects commerce the foreignness of the objective of those engaged in the activity and the degree of intrustion into the affairs of the foreign entity which will be brought about by that entity's response to the activity in question." That formulation appears to me to be a sound reading of both *Shippers Stevedoring*, see *infra*, and *Windward*.[18]

Only recently, the Court of Appeals for the First Circuit has also had occasion to apply *Benz et alia* to a controversy arising from President Gleason's mandate. Reacting to the facts now before me in the *Allied* case, Allied sued the Union for damages in U.S. District Court, urging three separate causes of action. One of these was a claim under Section 303 of the LMRA, which provides a private right of action for violations of Section 8(b)(4). The District Court held that Allied was not entitled to relief under Section 303; in reversing, the Court of Appeals (Senior Circuit Judge Aldrich dissenting) construed the *Benz* line of cases as affording "commerce" jurisdiction to the facts before it. *Allied International, Inc.* v. *International Longshoremen's Association, AFL-CIO*, —— F.2d. —— (January 6, 1981).

The Court read *Benz* through *Windward* (with the exception of *Ariadne*) as "involv[ing] the question whether the Act affirmatively protected union activity directed at

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[18] The Court's other isolated shorthand references to the proper test—"boycotts that could be remedied by domestic action," "the object of the dispute determines whether or not it is 'in commerce'," and "the nature of the reasonable responses that would accommodate the union's complaint"—are evidently subsumed into the more comprehensive statement set out in the text.

the working conditions aboard foreign-flag vessels," and thought that the Supreme Court had decided those cases as it did because "[t]o find that the picketing in *Incres, Benz* and *Windward* was protected by the Act would have implied the jurisdiction of the NLRB over the foreign labor conditions that gave rise to the picketing;" such an implication would, in turn, necessitate inquiry into the "internal discipline and order" of a foreign vessel.

It may be argued that the Court's reading of *Benz, Incres,* and *Windward* is erroneous insofar as it finds in *Windward* merely a desire on the part of the Supreme Court to avoid an implicit claim of Board jurisdiction over the internal order and discipline of a foreign vessel. As earlier discussed, the majority of the Court in *Windward* seemed to agree with the dissent there that it was expanding the exception beyond "the inescapable intrusion into the affairs of foreign ships that was present in *Benz* and *Incres*" to include, in the underscored words of the dissent, disruptions having an "*economic impact* upon foreign shipping." As I read the majority opinion in *Windward,* its dilation of the possible economic ramifications of the picketing militates against the First Circuit's characterization of *Windward* as reflecting nothing more than a reiteration of the pre-*Windward* doctrine which only attempted, as the *Windward* dissent put it, to preclude "Board cognizance of a dispute [which] will necessarily involve Board inquiry into the *labor relations* between foreign crews and foreign vessels . . . ."

Initially, the First Circuit seemed to be concluding that the principal reason for distinguishing *Incres, Benz,* and *Windward* was that, as it happened, no foreign entities were as directly involved as they had been in those cases, and therefore no considerations of comity and accommoda-

tion in international trade obtained: "Here, an American union has ordered its members not to work for an American stevedore which had contracted to service an American ship carrying goods of an American importer, insofar as the work would involve handling goods originating in the Soviet Union. There is no question of interference in the affairs of a foreign employer." Thereafter, however, it becomes clear that the First Circuit was focussing on the absence of a primary "labor" dispute. The Court pointed out that the "primary dispute" before it was between the ILA and the U.S.S.R. over the military policy of the latter, and it "would be absurd to contend that application of the secondary boycott provisions would imply NLRB jurisdiction over *this* primary dispute, *i.e.*, over Soviet military policy" (emphasis in original).

The Court then went on, in the context of a discussion of the effect of the *Mobile* case, to conclude that *Windward* (and, *a fortiori*, *Mobile*) does not apply to the present facts because the "primary" controversy here was not a "labor" dispute. It stated:

> We read *Mobile* as establishing that in the case of interrelated labor disputes, particularly disputes that give rise to similar conduct carried out at a single site, a "primary dispute" cannot be extricated from a "secondary dispute" for purposes of contrary jurisdictional findings.
>
> Here, however, there is no attempt to "bifurcate" the effects of a single union action. The *only* labor-related activity in issue has been played out by an all-American cast. The fact that this domestic dispute was inspired by military events in foreign lands—events far beyond NLRB jurisdiction—does not counsel

> against application of the NLRA to the labor dispute ongoing here at home. In sum, none of the considerations that prompted the Court in cases such as *Windward, Incres,* and *Benz* to find the Act inapplicable have force in this context. [Emphasis in original.]

In a subsequent footnote, responding to the dissenting opinion, the majority emphasized its conclusion that *Benz-Mobile* applies only where a "primary" "labor" dispute exists; since no such dispute could be found here, the problem of "bifurcation" presumably becomes irrelevant: "[W]e think those cases are adequately explained on the principle that in a case involving *intertwined* 'primary' and 'secondary' *labor* disputes, lack of Board jurisdiction over the primary dispute will preclude Board jurisdiction over the secondary conduct—more particularly where a contrary ruling might well suggest an improper interference by the United States in the relationship between foreign employers and laborers" (emphases in original).

If I am interpreting the majority opinion correctly, it did not rely on the *Grain Workers* cases previously described (although it discussed them) to conclude that the instant facts permitted separate consideration of secondary conduct; rather, it held that the *Benz-Windward* prong of the doctrine did not apply at all, since those cases require a threshold finding that the "primary" dispute is "labor"-related in order for any aspect of the dispute to even tentatively qualify for exemption from "commerce." It does seem that, were the primary controversy here a "labor" dispute, the majority might have held that any secondary character of the conduct was not separable ("We read *Mobile* as establishing that in the case of interrelated labor disputes, particularly disputes that give rise to similar

conduct carried out at a single site, a 'primary dispute' cannot be extricated from a 'secondary dispute' for purposes of contrary jurisdictional findings.")

Senior Circuit Judge Aldrich dissented on this count. In his view, the *Benz* line "establishes the general proposition that the NLRA does not reach, directly or indirectly, labor controversies in which the 'primary' dispute relates to the internal affairs of a foreign entity (in those cases, foreign shipowners)." Judge Aldrich believed that the present "primary" dispute fell within that category, and, because of *Mobile*, he found no basis for coverage of the "secondary" aspects of the dispute: "[T]he internal management or affairs of foreign entities are none of the Board's business, directly or indirectly." [19]

2. The Meaning of *Mobile*.

As indicated above, I am inclined to agree with the Fifth Circuit (and Judge Aldrich) as to the general applicability of *Windward* to disputes of the present kind. Had Respondents simply engaged in picketing of Russian ships and cargoes, no further analysis would be required. But certain language in *Mobile* raises a question as to whether the form of action engaged in by Respondents—overt inducement of members not to work on Russian ships and cargoes for secondary employers, rather than primary picketing of such ships and cargoes—requires a different result.

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[19] Judge Aldrich, however, would have held actionable Allied's tort claim in admiralty based on the Union's asserted wrongful interference with existing and prospective business relationships. The majority had held, under analogous Supreme Court precedent relating to the displacement by Section 303 of state law damage actions based on peaceful secondary picketing, that a claim in tort under federal common law also did not survive the enactment of Section 303. See *Local 20, Teamsters, Chauffeurs & Helpers Union* v. *Morton*, 377 U.S. 252.

Appendix B

Until *Mobile,* the problem of what activity did or did not affect "commerce" for jurisdictional purposes had been treated more or less as an abstract question—given the conduct and either its effect on principles and circumstances of international relationships (*Windward*) or the effect thereon resulting from Board inquiry into the conduct (*Benz* and the others), should the Board be denied authority to regulate (or to refuse to regulate) the conduct? The issue was not evaluated in conventional labor law terms of "primary" or "secondary" disputes or employers, or by examining the relationships between the parties involved in the situations.

In *Mobile,* however, the argument was made that the "commerce" analysis might be affected by the identity of the parties appearing in the state court, thus to some extent introducing labor law party concepts into the jurisdictional question. Given that state court jurisdiction is not preempted when the *foreign shipowner* sues the union for picketing, could that jurisdiction nonetheless be precluded by federal law when *the American stevedoring company* sues the union for interfering with its business by virtue of the same conduct, a conflict which might arguably fall within Section 8(b)(4) of the Act?

The *Mobile* majority said no, pointing out that since the response of the stevedore's employees to the picketing was a "crucial part of the mechanism by which the maritime operations of the foreign ships were to be affected," the "effect of the picketing on the operations of the stevedores and shippers, and thence on these maritime operations, is precisely the same" regardless of which party complains about it. "[A]ctivities" which "plainly were not" "commerce" in *Windward* do not become "commerce" simply because a stevedore or a shipper, rather than a shipowner,

invokes the state court's jurisdiction. The majority rejected "the proposition that a secondary employer's domestic business activities may be the basis for Board jurisdiction where the primary dispute is beyond its *statutory* authority over unfair labor practices 'affecting commerce'" (emphasis in original). This approach seems to suggest that where the underlying controversy has *Benz* or *Windward* implications, secondary behavior connected with it also falls outside the Board's jurisdiction; if the Board cannot hear a complaint by a foreign shipowner, it also cannot hear a complaint by a stevedore arising from the dispute between the union and the shipowner.

Nonetheless, the Court seemed to preserve the viability of the *Grain Workers* cases, citing them in a footnote and saying that its ruling in *Mobile* "need cast no doubt on those cases which hold that the Board has jurisdiction under §8(b)(4) of domestic secondary activities which are in commerce, even though the primary employer is outside the United States." It is argued that this apparent approval defines and limits *Mobile,* marking out the boundaries of certain "secondary" conduct as to which the Board, post-*Mobile,* retains jurisdiction. As previously described, in the *Grain Workers* cases, a Canadian union was engaged in a dispute with Upper Lakes, a Canadian shipping company. To support the Canadian union, an American union induced its members, employees of Continental Grain, an American company, not to load Continental's grain on Upper Lakes' ships while the latter were in Chicago to take on grain at Continental's elevator. The Board, the Seventh Circuit, and the District of Columbia Circuit all agreed that the American union's conduct was in "commerce," not governed by *Benz et alia,* and violative of Section 8(b)(4).

Appendix B

What sort of conduct, if any, was the *Mobile* Court saving for Board jurisdiction "even though the primary employer is located outside the United States?" Putting aside the *Grain Workers* footnote, and examining only the body of *Mobile*, the text seems to suggest a comprehensive, rather than a narrow, ban on assertion of Board jurisdiction over secondary conduct related to a primary *Windward* dispute.

It could, perhaps, be argued that the square holding in *Mobile* is limited to its known facts; that the Court was saying nothing more than that "primary" picketing always subsumes an intention to embroil secondary employers, and since the latter are inherently victimized by the "primary" picketing, and since that picketing has been held to have certain consequences which place it beyond the Board's jurisdiction, to allow the Board an opportunity to examine into the conduct would possibly permit it to inquire into "activities" already adjudged not to be in "commerce."

It could also, and perhaps more persuasively, be argued that the Court was holding that *any* secondary conduct related to the picketing was beyond the Board's jurisdiction; that is the implication of the broad statement that "Here, neither the farmer seeking to ship his soybeans, the stevedores who contracted to unload the cargo of the foreign-flag vessel, nor the longshoremen whom the stevedores employed to carry out this undertaking, were for these purposes engaged in or affecting commerce within the purview of the National Labor Relations Act. Therefore the petitioners' picketing did not even arguably violate § 8(b)(4) of the Act." 419 U.S. at 228.

It is contended, however, that the *Grain Workers* cases noted with apparent approval by the Court authorize Board jurisdiction here because, as in those cases, an American

union has induced employees of American companies to withdraw their services from their employers in order to affect foreign employers. The proffered distinction is that where the union's action is *first* directed against the American employer, by inducement of his employees, the conduct is in "commerce," as in the *Grain Workers* cases, whereas when the union, impelled by the same motivation, directly engages in picketing of the foreign employer, with the underlying purpose of inducing its members who work for a secondary employer to refuse to work, that conduct is not in "commerce," as in *Mobile.* This seems to be the alternative line of argument advanced here by the General Counsel:

> Put another way, when a domestic union's conduct is directed immediately at a foreign person whose operations involve activities both within and outside of domestic "commerce," the inquiry as to whether the conduct is "in" or "affecting commerce" for the purposes of the Act necessarily focuses on the question whether the object of the union's conduct is to affect the domestic commercial activities of the foreign entity, as in *Ariadne,* or to affect its operations extending beyond domestic commerce, as in *Windward-Mobile.* If the former, the Board has jurisdiction; if the latter, the Board's jurisdiction does not lie. However, where, as in *Grain Workers* and in the instant case, a domestic union's conduct is immediately directed at a domestic person whose operations are indisputably in commerce, that conduct is also "in commerce," regardless of whether the union's ultimate object is to indirectly influence the non-domestic commerce activities of a foreign entity.[10]

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[10] Earlier in his brief, General Counsel had taken the position that *Windward* applies only to union action "designed to . . .

General Counsel thus asserts that, even when conduct might ordinarily appear to be *Windward*-excluded from Board jurisdiction, where that conduct is "immediately directed" at a domestic person, the *Grain Workers* cases apply without further consideration of the object of the conduct.[21]

But since *Windward* seems to hold that the question of Board-or-state jurisdiction over certain activity may be determined by an assessment of the impact of the activity itself upon foreign trade, does it make sense, for purposes of determining whether the "activity" is in "commerce" or not, to make the answer turn upon the identity of the party "first" affected by the activity? *Mobile*, and the implication of General Counsel's argument earlier

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directly affect the labor relations of foreign vessels vis-à-vis their foreign crews or otherwise intrude into the maritime operations of foreign-flag ships," and was thus "inapposite to the instant proceedings." The argument quoted above is made on the *arguendo* assumption that *Windward* may also apply to "jurisdictional issues extending beyond the confines of maritime operations of foreign-flag ships."

[21] I have some trouble with this analysis, aside from that set out above, *infra*. For one thing, as we have seen, the *Windward* majority spoke not simply of the union's "object" but also of the foreseeable reverberating effects on the foreign entity and other parts of the trade community, including the United States. For another, the contention that, in the present case, the conduct is "immediately directed" against a "domestic person" rests on the notion that the Respondent International's order to withhold labor has its first impact upon the domestic secondary employers. As the Court pointed out in *Mobile*, however, that same impact characterized that situation: "[T]he response of the employees of the American stevedores was a crucial part of the mechanism by which the maritime operations of the foreign ships were to be affected." 419 U.S. at 224. It may be said that the order here was not any more "immediately directed" at the stevedores than the picketing in *Mobile*, which was designed, as the Court said, to influence their employees to refuse to work.

quoted, stand for the proposition that had the ILA authorized the use of pickets in the various ports, picketing the Russian ships or cargo as they attempted to leave or arrive, any concurrent secondary motivation for the activities, no matter how blatant, would be outside the Board's reach.[22] If that is the correct proposition, I find it difficult to believe that the Court intended to create such a tenuous distinction—that, in deciding the jurisdiction of the Board over two forms of union activity having the identical impact on foreign trade, it is improper for the Board to assert such jurisdiction when the impact is caused by union picketing of a foreign ship accompanied by the most unmistakable evidence that the picketing has a secondary objective, but it is not improper for the Board to assert jurisdiction when the union omits the picketing and simply engages in secondary conduct. The result of such a rule would be that if the Union wished to opt for state rather than Board jurisdiction during the next Afghanistan, it would order picketing rather than issue a press release (and then, if it desired, within the confines of that picketing, engage in open and notorious secondary conduct).

While it seems unlikely to me that the Court would have attached meaningful weight to such a distinction, the *Grain Workers* footnote in *Mobile* cannot be ignored. The Fifth Circuit in *Baldovin, supra,* 626 F.2d at 453, n. 5, thought that the *Grain Workers* cases were distinguishable from the present situation, but felt that no "bright line can be drawn between them" and the instant boycott, and in

[22] Such as, e.g., picketing having the demonstrable purpose of inducing longshoremen not merely to honor a picket line, but "to engage in concerted conduct against their employer to force him to refuse to deal with the struck employer," *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO* v. *NLRB,* 366 U.S. 667, 673-674.

Allied International, Inc., supra, Judge Aldrich said in dissent that despite the Supreme Court's indication that its holding in *Mobile* "need cast no doubt on" the *Grain Workers* cases, "[t]o [his] mind, *Mobile* casts considerable doubt on them." [23]

It may be that the *Mobile* Court saw the following difference between the cases. In the *Grain Workers* cases, a "primary" dispute existed between the Canadian employer and the Canadian union prior to the American union's decision to take action. In one of the *Grain Workers* cases, 376 F.2d 774, 776, the D.C. Circuit said that the "short answer" to the *Incres* contention there made by the union "is that the Board is not here exercising jurisdiction over the Canadian primary dispute, but over secondary activity in this country . . . ." It may be that the

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[23] The Fifth Circuit essayed the following distinctions between *Mobile* and the *Grain Workers* cases:

> The American union's objective was to prevent the American employer from doing business with the Canadian shipper and thus to embroil the American employer in the foreign labor dispute. The objective was to influence action in the United States, not abroad. The union activity was designed to affect directly the American employees in their relationship with their American employer, thus bringing the *Grain Elevator* cases more closely in line with *Ariadne*, where the Act was applicable, than with *Windward*, where the Act was inapplicable. While we think that the *Grain Elevator* cases are distinguishable from the present cases, the distinction is solely one of degree and we cannot say that a bright line can be drawn between them and the present cases.

In *Allied International, supra,* the First Circuit discussed the *Grain Workers* cases, but did not seem to rely heavily on them or on any purported dissimilarity between picketing and a "hot cargo" order; as described above, the Court thought *Mobile* applied to oust Board jurisdiction of secondary conduct only where the Board has no jurisdiction of the primary dispute "in a case involving *intertwined* 'primary' and 'secondary' *labor* disputes" (emphasis in original), which is not the present case. The Court thus did not reach the *Mobile* issue.

Mobile majority felt that secondary American conduct relating to an extant and active controversy between foreign disputants could not have the same potential for disruption of foreign commerce as might be engendered by a freshly-created direct dispute between an American union and a foreign entity.

I merely speculate; the Court did not indicate that its footnote was based on such a theory. It should be kept in mind, in appraising this footnote and its meaning, that the *Grain Workers* reference was, after all, *obiter dictum;* since the allusion to those cases was unnecessary to the decision, it cannot be regarded as a thoroughly considered definition of the dimensions of *Mobile.* For the reasons previously given, I am inclined to conclude that (1) the *Grain Workers* cases were thought by the Court to be applicable only to an ongoing foreign primary dispute, on the reasoning suggested above, or (2) the footnote approval of those cases does not represent a mature consideration of their implications, as previously discussed.

3. The Relevant Board Cases.

Two cases decided by the Board bear on the present issue.

Respondent ILA has engaged in boycotts for "political" purposes before, and in *Local 1355, International Longshoremen's Association (Ocean Shipping Service, Ltd.),* 146 NLRB 723, the Board was confronted with the first of these. On that occasion, in 1962, ILA issued a press release setting out the steps it was taking to eliminate trade with Cuba, including a determination not to "load or unload cargo of any nature in ships of any owner whose vessels are used in trade with Cuba." An ILA local accordingly refused to refer employees to a Maryland steve-

dore to fit the Tulse Hill, a blacklisted foreign ship manned by foreign nationals.

In holding that the respondent unions had violated Section 8(b)(4) as charged, the Board made a footnote rejection of the respondents' contention that the Board was without jurisdiction because "the Tulse Hill is a foreign-flag vessel manned by an alien crew." The Board, citing *Incres* and other cases, stated (146 NLRB at 724, n. 3), "As the instant proceeding involves no issue bearing upon labor relations aboard the Tulse Hill, its registry and the composition of the vessel's crew are immaterial in determining the Board's power to entertain Ocean's unfair labor practice charges against Respondents." [24]

I do not view the Board's evaluation in *Ocean Shipping* of its jurisdictional authority as necessarily binding upon me. That case was decided in 1964, and while the Board accurately reflected the reach of *Benz-Incres* at that time, it may fairly be said that *Windward* and *Mobile,* handed down 1974, represent an extension of the doctrine, beyond the "labor relations" of a foreign vessel, which renders *Ocean Shipping* obsolete to that extent.[25]

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[24] On review, a panel of the Fourth Circuit, Judge Bryan dissenting, reversed the Board's finding of violation on the ground that the Board has no jurisdiction over controversies which are not "labor disputes" as defined in Section 2(9) of the Act. The panel majority also went on to hold that Section 8(b)(4) was inapplicable to the dispute for other reasons. 332 F.2d 992. Soon thereafter, the Board expressed disagreement with the Fourth Circuit's holding that a "labor dispute" is a prerequisite to Board jurisdiction under Section 8(b)(4), *National Maritime Union of America (Weyerhaeuser Lines),* 147 NLRB 1317, and, since then, several courts have indicated disapproval of the Fourth Circuit's position, e.g., *National Maritime Union of America* v. *NLRB,* 346 F.2d 411, 415 (C.A.D.C.).

[25] The same staleness consideration applies to the Board's assertion of jurisdiction in one of the *Grain Workers* cases, decided in

Appendix B

A recent Board decision, on the other hand, must be deemed a more timely assessment of current Supreme Court authority. In *National Maritime Union of America (Shippers Stevedoring Company), supra,* 245 NLRB No. 29, decided in 1979, the claim was successfully advanced by the respondent union that *Windward-Mobile* displaced Board jurisdiction of the dispute. There, a union which represented American seamen picketed, in the port of Houston, a Russian-owned vessel carrying a cargo of German-built automobiles. The underlying grievance was ostensibly that the carriage of such cargo by the Russian ship violated a United States law requiring that half of all cargo funded by a United States government agency be transported in American-flag vessels.[26] Picket signs protested "Sending U.S.A. Tax Dollars to Support U.S.S.R. Merchant Fleet." ILA longshore employees requested by the charging party stevedoring company did not report for work during the picketing. The General Counsel issued complaint under Section 8(b)(4)(i)(ii)(B). The union argued that the Board was without jurisdiction.

After liberally quoting *Windward* and *Mobile,* the Administrative Law Judge held concisely:

> The General Counsel argues that since the picketing in the instant case was not directed at the employer-employee relationship of the Skulptor Golubkina, the Supreme Court's opinions in *Windward* and *Mobile*

1965. *Grain Elevator, Flour and Feed Mill Workers, International Longshoremen Association, Local 418, AFL-CIO (Continental Grain Company),* 155 NLRB 402, 403, n. 6.

[26] Other evidence, however, suggests that the union was more generally attacking the use of foreign vessels to transport American-purchased cargo.

are not dispositive of the issues in this case. I disagree.

The Court in *Windward* set forth in effect that virtually none of the predictable responses of a foreign shipowner to picketing of the *Windward* type would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate. The facts in the instant case warrant, in my opinion, even more so such a conclusion and, similar to the Court's opinions in the *Windward* and *Mobile* cases, the picketing of the Skulptor Golubkina was not "in commerce" as defined by the Act.

Thus, I find it clear that the picketing activities of the Union directed to the foreign-flag ship, Skulptor Golubkina, was not picketing "in commerce" within the meaning of the LMRA. The *Mobile* case reveals that a bifurcated view of such "commerce" was not permitted as regards employers, employees, or persons loading or unloading such commerce, and that such picketing activities as regards such employers, employees, or persons were not covered by the Act.

In adopting the recommendation of the Administrative Law Judge to dismiss the complaint, the Board indicated no reservations about his rationale or result.

It should be noted that in rejecting the General Counsel's contention that *Windward* and *Mobile* were not controlling because the picketing was "not directed at the employer-employee relationship" aboard the vessel, the Administrative Law Judge did so by relying on that portion of *Windward* which adverted to the determination that "none of the predictable responses of a foreign shipowner to picketing of the *Windward* type would be limited to the

sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate." The Charging Parties in *Kansas Farm Bureau, et al.* vigorously attack this analysis as an unwarranted truncation of the more comprehensive *ratio decidendi* set forth in the *Windward* case.[27] I must say that in the context of *Shippers Stevedoring,* I am not sure what one might consider to be the projected "predictable responses" of the Russian government, which owned the vessel; the evidence makes it clear, in my view, that the protest was really directed at the United States Department of Transportation.[28] Nonetheless, the ultimate objective of the picketing was to affect the choice of vessels used to transport American goods, and thus to influence adversely the future operations of many foreign vessels in the American trade (including, but not limited to, the Russian vessel involved in the case).

If I were to conclude that the Board, in *Shippers Stevedoring,* has approved a test under which jurisdiction is measured by the single question of whether or not the predictable responses of a foreign entity to a union's antagonistic conduct might extend beyond the kind of "wage-cost decision benefiting American workingmen which the LMRA was designed to regulate," I would have to say, as to the present cases, that the predictable responses here plainly would so exceed that kind of decision, and hence the Board would be without jurisdiction (unless *Mobile*

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[27] On the other hand, the Charging Party in *Occidental Chemical Company* believes that the Administrative Law Judge in *Shippers Stevedoring* "correctly thought this fact important because it illustrated why, under the particular circumstances of the case, the test for Board jurisdiction, absence of conflict with foreign labor and maritime laws or policies, was *not* satisfied" (emphasis in original).

[28] See *Shippers Stevedoring,* ALJD pp. 5, 7, 8.

permits jurisdiction because of the nature of the present conduct). If I were to assume that the Board *sub silentio* applied a broader test, assaying, as the Court seemed to do in *Windward,* the substantiality of the international ramifications of the conduct, it would follow that the Board thought that the picketing, which ultimately sought a reduction of unspecified foreign vessels used to transport American cargo, portended the sort of consequences which brings union conduct within the *Windward* exemption.[39] Either analysis, it seems to me, tends to argue for also finding absence of jurisdiction in the present case (prescinding, again, the *Mobile-Grain Workers* issue, to which I now turn).

The net result of *Shippers Stevedoring* was to hold that the Board could not "bifurcate" the case and find Section 8(b)(4)(i)(ii)(B) applicable, regardless of the assertedly unlawful conduct in which the union had engaged. Although the General Counsel had attempted to establish a separable objective of ensnarement of the longshoremen scheduled to unload the vessel, the Administrative Law Judge refused to consider or analyze the evidence pertinent to this contention, despite his conclusion that the sole objective of the picketing was secondary in nature.[40] In do-

[39] The *Kansas Farm Bureau et al.* Charging Parties suggest that *Shippers Stevedoring* was an ill-considered decision, probably because released in the well-known end-of-the-fiscal-year "flurry" of Board decisions. I note, however, that the Board did not adopt the Administrative Law Judge's decision until some 8 months after its issuance, an unusual delay which arguably indicates that the Board paid careful attention to the problem. As I read Occidental's brief, it finds no fault with the result in *Shippers Stevedoring.*

[40] The Administrative Law Judge found that "the only objective in the picketing was to cause employers or employees who were involved in or were assigned to or were unloading the Skulptor Golubkina to cease doing so."

ing so, he seemed to be holding that whether or not a separable secondary violation might be found within the confines of "the picketing activities of the Union," any such conduct would be too enmeshed with the activity already determined to be not in "commerce" to permit independent consideration and adjudication. The complaint was thus dismissed without any examination into the possibility of a distinct unfair labor practice being contained within the general boundaries of the primary picketing.[21]

In my view, *Shippers Stevedoring* goes a long way toward dictating a like result in the present cases.

4. The Positions of the Parties.

Perhaps indicative of the anfractuous character of the present issue are the positions enunciated by the General Counsel and the Charging Parties in each case. As I read their analyses, and I hope that I do not misrepresent them, none of the proponents of the violations charged quite agrees with any other about the appropriate rationale for finding the existence of Board jurisdiction here.

I have earlier discussed General Counsel's interpretations of *Windward* and *Mobile*. The brief submitted by the Charging Parties in *Kansas Farm Bureau et al.* would limit *Windward-Mobile* to conduct relating to union "interference with the maritime operations of foreign vessels" and no more; since, these Charging Parties contend, Respondents have not "taken any steps, including picket-

[21] In *Baldovin, supra*, as set out previously, the Fifth Circuit accorded great weight to *Shippers Stevedoring*, construing it to "adopt [ ] as the touchstone for determining whether a particular activity affects commerce the foreignness of the objective of those engaged in the activity and the degree of intrusion into the affairs of the foreign entity which will be brought about by the entity's response to the activity in question."

ing, designed to affect foreign maritime operations," and such interference "is neither an object of the union's conduct here nor an essential part of the mechanism through which the union intends to achieve its objectives," the Supreme Court cases do not apply. I am unable to agree with this contention.

Perhaps the argument is more esoteric than I recognize, or perhaps it is an effort to hold the union to its claim that it had no desire to interfere with anyone's business, but I cannot find any basis for the assertion that President Gleason's order did not intend to interfere with, *inter alia*, the maritime operations of foreign vessels. Elsewhere, these Charging Parties state that the Board has "recognized that the secondary effects of a political boycott are necessarily the *heart* of such union conduct" (citing *Local 1355, International Longshoremen's Association (Ocean Shipping Service, Ltd.), supra*), and it seems clear that imputing such secondary intentions to the Union cannot be done without also imputing an intention to have an impact upon foreign trade.

The brief for the Charging Party in *Occidental* summarizes:

> [In *Windward* and *Mobile*,] [t]he one respect in which the Court extended the earlier decisions was in broadening the area in which principles of comity would come into play. As the *Windward* Court observed, "[t]he picketing activities in this case do not involve the inescapable intrusion into the affairs of foreign ships that was present in *Benz* and *Incres*." 415 U.S. at 113. Instead of excluding from the Board's jurisdiction only those cases in which there was an "inescapable" conflict with the labor and maritime laws

> and policies of a foreign government, Congress, the Court concluded, also intended to exclude from the Board's jurisdiction those disputes in which conflict with foreign labor and maritime laws and policies was merely likely. An increased sensitivity to the need to avoid conflict with foreign labor and maritime laws and policies clearly does not indicate that the Court abandoned its view that the presence of such conflicts was the touchstone for determining the jurisdiction of the Board. (Footnote omitted.)

The problem with this formulation is the assertion that after *Windward,* the litmus test was still limited to the existence of "conflict with the labor and maritime laws and policies of a foreign government." My reading of *Windward,* consistent with Justice Brennan's, is that the Court moved beyond the possibility of that kind of conflict and incorporated, as well, the possibility of substantial adverse economic impact on a foreign party and foreign trade.

Finally, Allied International, Inc., argues:

> Allied reads the essence of *Windward* and *Mobile Steamship* as being that considerations of comity demand that union action that has the intent including foreseeable consequences of requiring a foreign entity to make a significant management decision be deemed to be not "in commerce" within the meaning of the NLRA . . . . In short, the Board loses jurisdiction only because it is foreseeable that the union's conduct can achieve its intended effect of significantly and directly affecting a foreign management decision. If it is foreseeable that the Union's conduct will be totally ineffective in achieving its foreign objective then there

is no underlying comity interest to be served by withholding NLRB jurisdiction . . . . No reasonable person could possibly believe that the ILA's boycott will foreseeably have the slightest chance of forcing Russia to abandon its invasion of Afghanistan . . . . If the test for whether the Board does or does not have jurisdiction is to be the foreseeable effects of the union's conduct upon foreign nations or nationals as compared to Americans, then it becomes not at all "anomalous" that in some situations the Board would have jurisdiction when the primary dispute was not a labor dispute but would not have it in other situations when the primary dispute was a labor dispute. See *Baldovin* supra p. 2554 of 105 LRRM. The question of whether or not the primary dispute is a labor dispute has absolutely nothing to do with the fundamental principles of comity and accommodation in international trade upon which *Windward* and *Mobile Steamship* are predicated. By way of contrast, the foreseeable results or lack thereof of the union's conduct upon foreign governments and foreign nationals has everything to do with those fundamental principles of comity and accommodation.

Allied thus accepts that the *Windward* principle may apply where "foreign governments and foreign nationals," not simply foreign shipowners, are affected by union conduct. Further, it recognizes that *Windward* addressed the foreseeable consequences of domestic union conduct upon foreign enterprises. It errs, I think, in saying that *Windward* applies only where the union's ultimate objective is capable of achievement. *Windward's* analysis concerned itself with the effect of picketing activities which "directly

affect" foreign maritime operations. There is no reason to believe that the "commerce" question should rise or fall on the issue of whether the union will be eventually gratified in its ultimate goal. When an immediate *Windward* impact is threatened against a foreign employer, there would seem to be as much of an "underlying comity interest to be served" by withholding Board jurisdiction as there was in *Windward,* regardless of the unlikelihood of union success in attaining its final objective.

Finally, Respondents argue that what is determinative on the "commerce" question is "the character of the dispute," and that when the dispute is about a "foreign government's invasion of a remote nation, it is . . . emphatically not" in "commerce." This argument does not, it seems to me, track with total fidelity the *Windward* decision, which engaged in a detailed speculative investigation of the economic consequences of the union's conduct there, examining the "predictable responses" of the employer and weighing, as well, the absence of benefit to American workingmen from that conduct.

Concluding Discussion

It is my obligation, of course, to apply the law consistently with the guidance provided by the Supreme Court and the Board. As I understand that guidance in the light of the *Windward* gloss on *Benz,* and the *Shippers Stevedoring* gloss on *Windward,* union conduct which is intended to disrupt foreign commerce and its instrumentalities, and which has the real capability of disrupting such commerce to a meaningful extent and beyond any immediate domestic benefits which could accrue to American workers, is not within the reach of Board jurisdiction, but rather is ex-

clusively subject to state laws.[11] In the present case, it was clearly the purpose of Respondents to significantly subvert the foreign trade engaged in by the Soviet Union, and the Union conduct to that end threatened the sort of ramifying consequences, affecting the Russian economy, without countervailing and limited benefit to domestic workers, to which *Windward* referred. Accordingly, *Windward* and *Shippers Stevedoring* both apply, unless the *Grain Workers* citations by the *Mobile* Court argue to the contrary.

In my view, the approval in *dicta* of those cases was either confined to their particular facts, distinguishable from the present situation, or cannot be construed as a considered disposition of the issue. I do not believe that the Supreme Court, *in determining whether Board or state law should apply to union activities,* would hold that the Board may assert jurisdiction when, as here, the union orders its members not to work for secondary employers, even though, under *Mobile,* the Board would be without jurisdiction if the union simply chose to accomplish the identical end by picketing, including the sort of picketing which the Board might otherwise consider to constitute a violation of Section 8(b)(4). There is no reason to believe that the Court would, *for purposes of assigning jurisdiction,* attach any weight to such a nebulous and controllable distinction. And further, as discussed, it appears to

[11] The logic of *Windward,* I think, compels a conclusion that the doctrine is not confined to conduct affecting "the maritime operations of foreign ships," but extends to foreign commerce in general. If, as here, a union intends to affect, *inter alia,* the operations of a foreign purveyor and purchaser of goods, the same sort of spiral of economic consequences is entailed as that envisioned by the *Windward* Court. I further note that *Windward* described *Benz* as demonstrating a reluctance by the Court to intrude domestic law into the complexities affecting "foreign trade." 415 U.S. at 110.

me that *Shippers Stevedoring* holds that if the "primary" dispute falls within *Windward,* separable secondary conduct in support of it falls within *Mobile.*

I shall, accordingly, recommend dismissal of the complaints in all three cases. The special facts in *Allied International* do not, I think, warrant separate treatment. No foreign vessels or crews were, it is true, involved in the *Allied* case; but the targeted Russian cargo sufficiently embroils a foreign government so as to bring the *Allied* situation within the reach of *Windward.*

As noted long ago, I cannot discern any great practical significance, from the point of view of the nongovernment parties, in whatever result is reached in these particular cases. As far as I can see, if the Labor Board is not available to the Charging Parties, the state courts then become the forum to which they turn. I am, I must say, rather puzzled as to why the Charging Parties have championed with such vigor the Board's exclusive jurisdiction over this subject matter, and equally puzzled why the Respondents have so fiercely resisted that jurisdiction. It would appear that secondary employers might prefer, in this area, as much access to the state courts as possible, since not only do state laws seem to be less protective of unions engaged in this sort of activity,[33] but also the employers invoking state laws are entitled to do so without having to convince a public prosecutor. Undoubtedly, however, the parties all

[33] While the Supreme Court held in *Local 20, Teamsters Union* v. *Morton, supra,* 377 U.S. 252, that state laws awarding damages against peaceful secondary picketing are supplanted by Section 303 of the Act, states would presumably be allowed *pro tanto* to award damages under their laws whenever it is held that union conduct is not "activity affecting commerce," a prerequisite to the application of Section 303.

have good reasons for the postures they have taken in this litigation.[34]

Having concluded that the Board is without jurisdiction, I need not dwell on the further issues presented. I would say, however, after preliminary consideration, that it is probable that the Board would find the principal violations alleged and that the First Amendment claims advanced by Respondents are not well-taken. Recognizing that some higher authority might disagree with my conclusion on the jurisdictional issue, I have made, I believe, all factual and inferential findings which would be necessary or useful in further processing of the cases.

Conclusions of Law

1. Respondents are labor organizations within the meaning of Section 2(5) of the Act.

2. The activities complained of herein are not in "commerce" within the meaning of the Act, and the complaint must therefore be dismissed for want of jurisdiction.

Upon the foregoing findings of fact and conclusions of law, I issue the following recommended:[35]

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[34] It also appears that arbitral relief may be available in such a situation. In Houston, in February 1980, an arbitrator found that the boycott violated the no-strike provision of the bargaining agreement, and ordered the two ILA locals and the District to desist from participating in it.

[35] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

Appendix B

ORDER

The complaint is hereby dismissed.

Dated: Washington, D.C., March 16, 1981

/s/ BERNARD RIES
Bernard Ries
Administrative Law Judge

No. 80-1663

Office Supreme Court, U.S.
FILED
APR 16 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, and T. W. GLEASON, Individually and as he is President of International Longshoremen's Association, AFL-CIO and H. R. HASSELGREN, Individually and as he is Secretary-Treasurer of International Longshoremen's Association, AFL-CIO and N. J. BOWERS, Individually and as he is Executive Vice President of International Longshoremen's Association, AFL-CIO and F. R. FIELD, JR., Individually and as he is General Organizer of International Longshoremen's Association, AFL-CIO and A. SCOTTO, Individually and as he is Regional Director of International Longshoremen's Association, AFL-CIO and J. T. MOOCK, Individually and as he is First Vice President of International Longshoremen's Association, AFL-CIO and R. A. MASSEY, Individually and as he is Second Vice President of International Longshoremen's Association, AFL-CIO and G. W. Dixon, Individually and as he is Third Vice President of International Longshoremen's Association, AFL-CIO and W. P. LYNCH, Individually and as he is Fourth Vice President of International Longshoremen's Association, AFL-CIO,

Petitioners,

v.

ALLIED INTERNATIONAL, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

APPENDIX C TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX C

United States District Court Opinion

UNITED STATES DISTRICT COURT

D. MASSACHUSETTS

Civ. A. No. 80-584-S.

ALLIED INTERNATIONAL, INC.,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASS'N, AFL-CIO *et al.*,

Defendants.

June 17, 1980.

Duane R. Batista, Nutter, McClennen & Fish, Boston, Mass., for plaintiff.

Gary G. Nicolosi, Thomas W. Gleason, New York City, Joseph T. Doyle, Condon & Doyle, Boston, Mass., for defendants.

MEMORANDUM AND ORDER

SKINNER, *District Judge.*

Plaintiff Allied International, Inc. ("Allied") seeks preliminary injunctive relief against the International Longshoremen's Association, AFL-CIO ("ILA"), its local unions and various union officials for their concerted refusal to load and unload ships engaged in trade with the U.S.S.R. Plaintiff asserts this action contravenes the Na-

tional Labor Relations Act secondary boycott provisions, 29 U.S.C. §§ 158(b)(4)(i), (ii)(B), the Sherman Antitrust Act, 15 U.S.C. § 1 et seq., and the common law protection against intentional interference with contractual relations. Defendants have moved to dismiss the complaint.

This action was consolidated with *Walsh* v. *International Longshoremen's Assoc.*, 488 F.Supp. 524 (D.Mass. 1980), a case in which I denied the National Labor Relations Board's application for an injunction under § 10(*l*) of the National Labor Relations Act, 29 U.S.C. § 160(*l*). The facts were fully set forth in that opinion. It is sufficient for present purposes to recount that Allied is a Massachusetts importer of wood products from the Soviet Union and has been informed by the defendants that no ILA members would unload any cargo originating in the U.S.S.R., pursuant to a directive issued January 9, 1980 by Thomas Gleason, President of the ILA, ordering this action in response to the Soviet invasion of Afghanistan. As a result, certain wood shipments were cancelled, curtailed, or unloaded prematurely by Allied's carrier, Waterman Steamships Lines, and other cargoes are amassed on the docks of Leningrad, pending resolution of this conflict or alternative arrangements.

The National Labor Relations Board ("NLRB") sought to enjoin the ILA's refusal to work on certain ships on the ground that such refusal constituted a secondary boycott, in violation of 29 U.S.C. §§ 158(b)(4)(i), (ii)(B). My denial of the § 10(*l*) petition was based on my explicit characterization of the dispute as "exercise of political protest."

> The ILA has not induced a strike against Allied, Waterman, or Clark [the stevedoring company]; nor

> does it seek to pressure those employers not to deal with one another. No picket lines have been established and no other employees have been prevented from work. Union members have simply declined to accept employment on certain ships, as a form of political protest. . . . This is a primary boycott of Russian goods, with incidental effects upn those employers who deal in such goods. As such, the actions of the respondents may not be prohibited by §§ 8(b)(4)(i), (ii)(b).

Walsh v. *ILA*, *supra* at 530.

Allied has carried on the battle, by pursuing private remedies in the present case. I shall deal with defendants' motion to dismiss first, as the facts are undisputed and the questions presented are purely legal ones which have been extensively briefed by the parties.

In Count I of its complaint, Allied seeks a private damage remedy under § 303 of the National Labor Relations Act, 29 U.S.C. § 187, alleging the same substantive violation of the secondary boycott provisions as were alleged by the NLRB in *Walsh*. My holding in *Walsh* applies as the law of the case in this consolidated action, and thus precludes Allied from asserting a claim under the National Labor Relations Act.

Allied also seeks injunctive and monetary relief under the Sherman Antitrust Act, 15 U.S.C. § 1, against defendants for their concerted refusal to deal, resulting in restraint of trade. The defendants contend that their actions (or non-actions) fall within the "labor exemption" to the antitrust laws, and that their actions are not otherwise punishable by the antitrust laws for lack of any purposeful restraint of trade or conspiracy.

The history of the application of injunctions and antitrust law to labor union activity and the legislative enact-

ments as reactions thereto have often been described. *See e.g., Allen Bradley Co.* v. *Local Union No. 3, International Brotherhood of Electrical Workers,* 325 U.S. 797, 65 S.Ct. 1533, 89 L.Ed. 1939 (1945); *United States* v. *Hutcheson,* 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788 (1941). The Sherman Act, enacted in 1890, prohibited "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce . . ." 15 U.S.C. § 1. As a result of the primary use of this statute against labor unions rather than the business "trusts" and combinations at which it was aimed, Congress passed § 20 of the Clayton Act of 1914 which exempted from the antitrust laws specific union practices by prohibiting injunctions against them in cases "involving, or growing out of, a dispute concerning terms and conditions of employment." 29 U.S.C. § 52. After the Supreme Court interpreted that statute to apply only to union activities directed against an employer by his own employees, *Duplex Co.* v. *Deering,* 254 U.S. 443, 41 S.Ct. 172, 65 L.Ed. 349 (1921), Congress enacted the Norris-LaGuardia Act in 1932, further broadening labor's protection against injunctions in cases "involving or growing out of a labor dispute." 29 U.S.C. § 101.

The first Supreme Court decision following these legislative pronouncements did not recognize any broad based exemption for labor union activity. Instead, in *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311 (1940), the Court utilized traditional Sherman Act analysis to find that a violent sit-down strike did not constitute a "restraint of trade" as understood at common law. A union would be held liable only if its activities had the purpose or effect to fix the commodity price, monopolize supply, or otherwise control the market. *Id.* at 512, 60 S.Ct. at 1002. A year later, the Court decided to treat labor and

non-labor combinations differently. In *United States* v. *Hutcheson*, 312 U.S. 219, 61 S.Ct. 463, 85 L.Ed. 788 (1941), the Court read the Sherman, Clayton and Norris-LaGuardia Acts together in creating a new test for the issuance of antitrust injunctions against union activity:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and illicit under § 20 [of the Clayton Act, 29 U.S.C. § 52] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Id. at 232, 61 S.Ct. at 466. Unions may thus qualify for a "labor exemption" from the antitrust laws so long as they do not combine with non-labor groups and act in their "self-interest", despite an apparent common law restraint on competition.

Both prongs of this standard have been further developed by the Supreme Court. Although a union's activities fall within the protection of the Clayton Act, it may be enjoined where it acts in combination with employers to restrict competition or control the product market. *United Mine Workers* v. *Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); *Allen Bradley Co.* v. *Local Union No. 3, International Brotherhood of Electrical Workers, supra.* On the other hand, where the union is not acting in a conspiracy with employers, the purpose behind its actions, as well as the impact of those actions upon the product market will be examined to determine liability. *American Federation of Musicians of the United States and Canada* v. *Carroll*, 391 U.S. 99, 88 S.Ct. 1562, 20 L.Ed.2d 460 (1968); *Local*

Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. *Jewel Tea Co.*, 381 U.S. 676, 85 S.Ct. 1596, 14 L.Ed.2d 640 (1965).

In the present case, the ILA did not agree, conspire or otherwise combine with non-labor groups to institute its boycott of Soviet goods. The carrier, Waterman, made alternative arrangements upon learning of the dock workers' decision, but this acquiescence does not constitute an agreement. The ILA members simply refused to work; they did not hinder or seek to control Allied's business arrangements with anyone.

The definition of "self-interest", as used in the *Hutcheson* test, has not been precisely outlined. In *Jewel Tea*, the Court analyzed a marketing hours restriction to determine whether it affected the wages, hours, and other terms and conditions of employment of union members. In *Carroll*, the Court looked at the goals behind various union regulations imposing, *inter alia*, minimum prices for musicians, and found the restrictions exempt due to the union's legitimate interest in maintaining a basic wage structure and improving working conditions. The emerging principle is that a union's acts are in its self-interest, ". . . if they bear a reasonable relationship to a legitimate union interest." *Adams, Ray & Rosenberg* v. *William Morris Agency*, 411 F.Supp. 403, 410 (C.D. Cal. 1976). *Accord, H. A. Artists & Assoc., Inc.* v. *Actors Equity Assoc.*, 478 F.Supp. 496, 501-2 (S.D.N.Y. 1979).

The ILA's actions here do not relate to a "legitimate union interest" as it has been defined in American labor history and law. This political protest falls outside of the traditional union activities concerning terms and conditions of employment. This conclusion is bolstered by the Clayton and Norris-LaGuardia Acts reference to "labor disputes"

only, supporting the fair inference that federal courts are not prohibited from issuing injunctions in "political disputes" under these acts. I must find, therefore, that the defendants' activities do not fall within the "labor exemption" to the antitrust laws.

It does not follow, however, that the union's action here constitutes a violation of the Sherman Act. Although the framework of analysis used in *Apex Hosiery* has been subsequently modified, its holding that the purpose of the antitrust law was to prevent restraints in business and commerce which tended "to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services," is still viable. *See Jewel Tea, supra* 381 U.S. at 690 n.5, 85 S.Ct. at 1602 n.5 ("The crucial determinant is not the form of the agreement—*e.g.*, prices or wages—but its relative impact on the product market and the interests of union members.").

The Supreme Court has specifically refused to "impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of the Act." *Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137, 81 S.Ct. 523, 529, 5 L.Ed.2d 464 (1961). The First Circuit has recently reaffirmed this doctrine in a case involving access to the public media by political organizations. *Council for Employment and Economic Energy Use* v. *WHDH Corp.*, 580 F.2d 9 (1st Cir.), *cert. denied*, 440 U.S. 945, 99 S.Ct. 1421, 59 L.Ed.2d 634 (1978). The Eighth Circuit has similarly refused to apply antitrust sanctions against a boycott related to the passage of the Equal Rights Amendment, unrelated to any economic interests, albeit with adverse economic impact upon innocent third parties. *State of Missouri* v. *National Organiza-*

tion of Women, Inc., 620 F.2d 1301 (8th Cir. No. 79-1379 March 28, 1980), *aff'g* 467 F.Supp. 289 (W.D. Mo. 1979).

Admittedly, the present case does not involve the right to petition the government for specific legislative enactments, as in the *Noerr* and *NOW* decisions. Nor does this case involve purely political opponents seeking to influence political decisions of the electorate, as in the *WHDH* decision.

I am presented here, however, with political activity in the sense of a direct political protest against the Soviet Union's foreign policy. While commerce between Allied and the Soviet Union and, ultimately, the American people is being restrained by the ILA's refusal to handle certain cargo, this refusal is wholly politically oriented with no apparent economic benefit accruing to the union or its members. The ILA is not seeking to control the market in any way, as was envisioned by the Court in *Apex Hosiery;* it merely wishes to register its protest. In such a situation, the Supreme Court's admonition in *Noerr* is particularly relevant:

> Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a commercial impact and involve conduct that can be termed unethical. *Noerr, supra,* 365 U.S. at 141, 81 S.Ct. at 531.

Moreover, the ILA is imposing no direct restraint on Allied, its customers or suppliers. Allied is still free to

unload its ships by non-union personnel. ILA members have not boycotted any ships not involved in trade with the Soviet Union, including those ships owned by carriers who maintain Russian trade elsewhere. A mere refusal to work, with no economic coercion to accede to specific anticompetitive union demands, has never been held a violation of the antitrust laws. *See Hunt* v. *Crumboch*, 325 U.S. 821, 824, 65 S.Ct. 1545, 1546, 89 L.Ed. 1954 (1945). Unions have been held liable only for direct affirmative restrictions upon product market competition. *See, e.g., Connell Construction Co., Inc.* v. *Plumbers & Steamfitters Local Union No. 100, United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO*, 421 U.S. 616, 95 S.Ct. 1830, 44 L.Ed.2d 418 (1975).

Accordingly, I find that the defendants have not engaged in a "restraint of trade" as defined by the antitrust laws, and this count must be dismissed.[1]

Plaintiff also alleges that defendants' actions constitute the tort of interference with business relationships and is actionable under general federal admiralty law. Where an alleged tort affects the operation of ocean-going vessels and bears a relationship to maritime service, commerce, or navigation, the cause of action is cognizable in admiralty. *Carroll* v. *Protection Maritime Insurance Co., Ltd.*, 512

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[1] Given my disposition of the Sherman Act claims, I need not reach defendants' argument that no conspiracy may exist when a union acts "unilaterally" with its members and locals. I note, however, that the Supreme Court had no problem with this issue in *Carroll*, and all the cases cited by the defendant relate to corporations and their subdivisions or officers. In addition, counsel for the defendants repeatedly stressed at oral argument the independent nature of each local's decision, characterizing the January 9 directive as one of "policy", not "command".

F.2d 4 (1st Cir. 1975). In such a case, it is appropriate to adopt the Restatement, Second, Torts (1977) as the substantive rule of decision. *Pino* v. *Protection Maritime Insurance Co., Ltd.*, 599 F.2d 10 (1st Cir. 1979).

> § 766 Intentional Interference With Performance of Contract by Third Person.
>
> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

A mere refusal to deal cannot constitute an interference as every worker may decline to offer his services just as every buyer may decide not to purchase. So long as no intentional and affirmative intrusion into Allied's business affairs has taken place, the defendants may not be held liable for their politically motivated refusal to handle Russian cargoes.[2]

Accordingly, defendants' motion to dismiss is ALLOWED, and plaintiff's motion for a preliminary injunction is DENIED.

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[2] The same result would have occurred under Massachusetts law, which requires a legally protected interest, intentionally invaded by conduct either per se unlawful or conducted with malice, and damages. *Old Colony Donut, Inc.* v. *American Broadcasting Cos., Inc.* 368 F.Supp. 785, 787 (D.Mass. 1974); *Caverno* v. *Fellows*, 300 Mass. 331, 333, 15 N.E.2d 483 (1938).

Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 80-1663

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, and T. W. GLEASON, Individually and as he is President of International Longshoremen's Association, AFL-CIO, and H. R. HASSELGREN, Individually and as he is Secretary-Treasurer of International Longshoremen's Association, AFL-CIO and N. J. BOWERS, Individually and as he is Executive Vice President of International Longshoremen's Association, AFL-CIO and F. R. FIELD, JR., Individually and as he is General Organizer of International Longshoremen's Association, AFL-CIO and A. SCOTTO, Individually and as he is Regional Director of International Longshoremen's Association, AFL-CIO and J. T. MOOCK, Individually and as he is First Vice President of International Longshoremen's Association, AFL-CIO and R. A. MASSEY, Individually and as he is Second Vice President of International Longshoremen's Association, AFL-CIO and G. W. DIXON, Individually and as he is Third Vice President of International Longshoremen's Association, AFL-CIO and W. P. LYNCH, Individually and as he is Fourth Vice President of International Longshoremen's Association, AFL-CIO,

Petitioners,

v.

ALLIED INTERNATIONAL, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED APRIL 3, 1981
CERTIORARI GRANTED OCTOBER 5, 1981

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District Court Docket Entries

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

ALLIED INTERNATIONAL, INC.,

Plaintiff,

VS.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*,

Defendants.

DATE	PROCEEDINGS
3–31–80	Complaint filed. Motion for preliminary Injunction filed. Motion for consolidation filed.
4– 1–80	National Labor Relation opposition to consolidate filed.
4– 2–80	Case referred to Magistrate ..... on motion 03.
4– 3–80	Pltf' memo in support of motion for preliminary Injunction filed.
5– 2–80	Deft's motion to quash service & dismiss filed.
5– 7–80	Affidavit of Herzl Eisenstadt filed.
5– 8–80	Affidavit of Joseph Doyle filed.
5– 9–80	Deft's memo in support of motion to dismiss filed.
6– 2–80	Deft's cross motion to dismiss filed.
6– 2–80	Affidavit of Thomas Gleason filed.

District Court Docket Entries

DATE	PROCEEDINGS
6- 2-80	Deft's memo in opposition to motion for Preliminary Injunction filed.
6- 2-80	Supplementary memo in support of pltf's motion for Preliminary Injunction filed.
6- 2-80	Pltf's opposition to deft's motion to dismiss filed.
6-17-80	SKINNER, D.J. MEMORANDUM AND ORDER Preliminary Injunction DENIED /c/c/cl
6-25-80	Notice of Appeal filed w/ cert. of service and filing fee.
7-15-80	Certified copy of docket entries and original pleadings forwarded to the Court of Appeals.
7-24-80	Steno Transcript of 6/6/80, filed.
7-28-80	Sten transcript of 6/6/80 sent to Crt. of Appls. under supplemental certificate.

Court of Appeals Docket Entries

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

ALLIED INTERNATIONAL, INC.,

Plaintiff-Appellant,

VS.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*,

Defendants-Appellees.

DATE	PROCEEDINGS
1980	
6-26-80	Copy of Notice of Appeal with district court docket entries received and filed and case docketed.
6-30-80	Appearance of Joseph T. Doyle, for appellee, received and filed.
7- 7-80	Appearance of Ernest L. Matthews, Jr., Esquire for International Longshoremen's Association, AFL-CIO, Appellees received and filed.
7- 8-80	Appearance of Duand R. Batista, Esquire for appellant received and filed and Docketing Statement pursuant to Local Rule 8(a) received and filed.
7-16-80	Record on appeal in one volume, received and filed. Notices mailed.

Court of Appeals Docket Entries

DATE	PROCEEDINGS
7–16–80	Motion to consolidate appeal with case no. 80-1330, and opposition thereto, filed. Order (Coffin, Ch.J.) denying said motion to consolidate. Notices mailed.
7–17–80	National Labor Relations Board's Opposition to the Motion for Consolidation of Appeals and to the Alternative Motion for Filing of a Brief and Participation in oral argument received and filed.
7–28–80	Supplemental certificate consisting of transcript, filed.
8–18–80	Motion filed. Order (Bownes, J.) granting leave to appellant to file an addendum to its brief. Notices mailed.
8–20–80	Brief for appellant, addendum to brief, and appendix filed. Notices mailed.
9–16–80	Brief for appellee, and addendum under FRAP Rule 28(f), filed by leave of court, received and filed.
9–22–80	Reply brief for appellant, filed.
9–29–80	Assigned for hearing at the October, 1980 session.
10– 6–80	Appearance of Duane R. Batista, for appellant, received & filed.
10– 8–80	Heard by Aldrich, Campbell & Bownes, J.J.
1981	
1– 6–81	Judgment: The district court's dismissal of Count I of the Complaint is vacated and the

Court of Appeals Docket Entries

DATE	PROCEEDINGS
	case is remanded for further consideration of Allied's prayer for damages and preliminary and permanent injunctive relief; and The district court's dismissal of Counts II and III of the Complaint is affirmed. One half costs to appellant. Opinion of the Court by Campbell, J., concurring and dissenting opinion by Aldrich, J. Notices mailed.
1–16–81	Itemized and verified bill of costs received and filed. Notices mailed.
1–27–81	Mandate issued, copy filed. Original papers returned to the district court. Notices mailed.
4–23–81	Notice of filing petition for certiorari (80-1663) Apr. 3, 1981.
5–22–81	Notice of filing petition for certiorari (80-1906) May 5, 1981.
8–24–81	Certified copy of proceedings sent to Supreme Court. Notices mailed.

Complaint

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

Civil Action No. 80-584-S

ALLIED INTERNATIONAL, INC.,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, and T. W. GLEASON, Individually and as he is President of International Longshoremen's Association, AFL-CIO and H. R. HASSELGREN, Individually and as he is Secretary-Treasurer of International Longshoremen's Association, AFL-CIO and N. J. BOWERS, Individually and as he is Executive Vice-President of International Longshoremen's Association, AFL-CIO and F. R. FIELD, JR., Individually and as he is General Organizer of International Longshoremen's Association, AFL-CIO and A. SCOTTO, Individually and as he is Regional Director of International Longshoremen's Association, AFL-CIO and J. T. MOOCK, Individually and as he is First Vice President of International Longshoremen's Association, AFL-CIO and R. A. MASSEY, Individualy and as he is Second Vice President of International Longshoremen's Association, AFL-CIO and G. W. DIXON, Individually and as he is Third Vice President of International Longshoremen's Association, AFL-CIO and W. P. Lynch, Individually and as he is Fourth Vice President of Longshoremen's Association, AFL-CIO,

Defendants.

Complaint

PRELIMINARY STATEMENT

1. This is an action alleging violations of the Labor Management Relations Act of 1947, Section 303 which deals with secondary boycotts, admiralty torts of interference with existing and prospective advantageous contractual relationships and violations of the Sherman and Clayton Antitrust Acts with respect to defendant labor organizations' boycott of Russian cargo in which plaintiff seeks injunctive relief prohibiting the continuation of such boycott, and appropriate damages for the resultant effect it has had on plaintiff's business.

THE PARTIES

2. Plaintiff, Allied International, Inc. (hereinafter "AIC") is a Massachusetts corporation with its principal place of business in Charlestown, Massachusetts, engaged in the business of importing hard board and birch plywood from the Union of Soviet Socialist Republics (hereinafter "Russia") and selling these products to manufacturers and wholesalers in the United States of America.

3. Defendant, International Longshoremen's Association, AFL-CIO (hereinafter "ILA") is a labor organization representing employees throughout the United States and Canada, including ports on the Atlantic and Gulf coasts engaged in the work of loading and unloading ocean going ships. Its principal place of business is New York City, New York.

4. Defendant Local 799 of the International Longshoremen's Association, AFL-CIO (hereinafter "Local 799") is labor organization representing employees in the Boston,

Massachusetts area, engaged in the work of loading and unloading ocean going ships.

5. Defendant, T. W. Gleason, a resident and domiciliary of New York, is being sued individually and as he is President of International Longshoremen's Association, AFL-CIO.

6. Defendant, H. R. Hasselgren, a resident and domiciliary of New York, is being sued individually and as he is Secretary-Treasurer of International Longshoremen's Association, AFL-CIO.

7. Defendant, N. J. Bowers, a resident and domiciliary of New York, is being sued individually and as he is Executive Vice President of International Longshoremen's Association, AFL-CIO.

8. Defendant, F. R. Field, Jr., a resident and domiciliary of New York, is being sued individually and as he is General Organizer of International Longshoremen's Association, AFL-CIO.

9. Defendant, A. Scotto, a resident and domiciliary of New York, is being sued individually and as he is Regional Director of International Longshoremen's Association, AFL-CIO.

10. Defendant, J. T. Moock, a resident and domiciliary of New York, is being sued individually and as he is First Vice President of International Longshoremen's Association, AFL-CIO.

11. Defendant, R. A. Massey, a resident and domiciliary of New York, is being sued individually and as he is Second

Vice President of International Longshoremen's Association, AFL-CIO.

12. Defendant, G. W. Dixon, a resident and domiciliary of New York, is being sued individually and as he is Third Vice President of International Longshoremen's Association, AFL-CIO.

13. Defendant, W. P. Lynch, a resident and domiciliary of New York, is being sued individually and as he is Fourth Vice President of International Longshoremen's Association, AFL-CIO.

JURISDICTION

14. This Court has jurisdiction over this matter pursuant to Section 303 of the Labor Management Relations Act of 1947, 29 U.S.C. Section 187; Admiralty, 28 U.S.C. Section 1333; and the Sherman and Clayton Acts, 15 U.S.C. Sections 1 and 15.

STATEMENT OF FACTS

15. For several years prior to January, 1980, Allied purchased hardboard and birch plywood from V/O Exportles (hereinafter "Exportles"), an agency of the Russian government and had such wood transported to Boston and other Atlantic and Gulf coast ports by ships owned by Waterman Steamship Lines, Inc. (hereinafter "Waterman").

16. This wood was purchased by Allied pursuant to calendar year contracts with Exportles in which contracts Exportles committed itself to provide a given amount and kind of wood for sale to Allied at a given price at the mill in Russia.

17. The last such contract referred to in paragraph 16 above expired on December 31, 1979, and Allied is in the process of negotiating a contract for 1980.

18. Allied maintained an agency contract with Sojuzvneshtrans (hereinafter "S"), another agency of the Russian government by the terms of which contract Allied paid "S" for making certain arrangements with respect to the transportation of the wood from the mills in Russia to the ports in the United States.

19. Allied and Waterman negotiated directly the terms, including cost, of a contract for transporting the wood from ports in Russia to ports in the United States.

20. When such negotiations were completed the agreed upon terms, pursuant to agreement with "S" and Soufract, another agency of the Russian government, were incorporated in a one-year contract between Soufract and Waterman.

21. As deliveries were made by Waterman, Allied paid "S" the contract price. "S" in turn paid the contract price to Soufract who paid the same price to Waterman.

22. The last such contract referred to in paragraphs 20 and 21 expired January 31, 1980.

23. On or about January 9, 1980, defendant Gleason in the name of defendant ILA issued the following directive:

> "In response to overwhelming demands the rank and file members of the Union, the leadership of ILA today ordered immediate suspension in handling all Russian

ships and all Russian cargoes in ports from Maine to Texas and Puerto Rico where ILA workers are employed.

"This order is effective across the board on all vessels and all cargoes. Grain and other foods as well as high valued general freight. However, any Russian ship now in process of loading or discharging at a waterfront will be worked until completion.

"The reason for this action should be apparent in light of international events that have affected relations between the U.S. and the Soviet Union.

"However, the decision by the Union leadership was made necessary by the demands of the workers.

"It is their will to refuse to work Russian vessels and Russian cargoes under present conditions in the world.

"People are upset and they refuse to continue the business as usual policy as long as the Russians insist on being international bully boys. It is a decision in which the Union leadership concurs."

24. The above directive was communicated immediately to all defendants.

25. Through this directive and otherwise, defendants induced and encouraged longshoremen throughout all Atlantic and Gulf ports not to handle Russian ships or Russian cargoes, except for ships in the process of loading or unloading.

26. As a result of the conduct described in paragraph 25 above, no Russian ships or cargoes were loaded or un-

loaded in Atlantic and Gulf ports without the permission of some or all of the defendants.

27. Defendants encouraged and received widespread publicity in the national media of the above-described events.

28. On or about January 9, 1980, the Waterman ship "Walton" was in Boston unloading a portion of a shipload of wood purchased by Allied and transported by Waterman pursuant to the arrangements set forth above. After discharging a portion of this wood, the ship was scheduled to proceed to Wilmington, North Carolina; Charleston, South Carolina; and Houston, Texas to unload the remainder.

29. On or about January 9, 1980, defendant Thomas Gleason told Allied that longshoremen represented by defendant ILA and its locals would not unload the "Walton" in any port other than Boston.

30. Some or all of defendants or their agents, servants or employees told Waterman or its agents, servants or employees, that pursuant to the directive as set forth in paragraph 23, they would order longshoremen represented by them in Wilmington, Charleston and Houston not to unload any Allied wood on the "Walton".

31. Some or all of the defendant or their agents, servants or employees told Waterman that longshoremen represented by them in Wilmington, Charleston and Houston would not unload any Allied wood on the "Walton" in those ports.

32. Some or all of defendants or their agents, servants or employees told one or more stevedoring employers that pursuant to the directive in paragraph 23 above, longshoremen represented by them in Wilmington, Charleston and Houston would not unload any Allied wood on the "Walton" in those ports. This information was communicated to Waterman.

33. Waterman, upon reading or hearing of the directive as set forth in paragraph 23 above and the conduct and events described in paragraphs 23-32 above concluded that longshoremen in Wilmington, Charleston and Houston would not unload any Allied wood in those ports.

34. As a result of the directive in paragraph 23 above, and/or other communications, Waterman agreed with one or more of the defendants, their agents, servants or employees and/or one or more stevedoring employers to order that the "Walton" be totally unloaded in Boston.

35. As a result of the threat, restraint, coercion and conspiracy described in paragraphs 23-34 above, Waterman, its agents, servants or employees, over the protests of Allied, ordered the Walton to be completely unloaded in Boston.

36. On or about January 9, 1980, the Waterman ship, the "Middleton", was in Leningrad, Russia being loaded with wood purchased by Allied. The "Middleton" was scheduled to be fully loaded with such wood and was scheduled to proceed to Boston, Wilmington, New Orleans and Houston for unloading.

37. As a result of the threats, restraint, coercion and conspiracy described in paragraphs 23-34, or similar threats, restraint, coercion and conspiracy, directed specifically at the "Middleton", Waterman or its agents, servants, or employees ordered that the "Middleton" proceed from Leningrad to Montreal, Canada with only one-third of Allied's contracted for wood aboard.

38. After January 9, 1980, Exportles advised Allied that because of the directive described in paragraph 23 above, and the resultant difficulties of getting cargo originating in Russia unloaded, including the experience of the "Walton" and the "Middleton" described in paragraphs 28-34, it was reducing the amount of wood it was prepared to contract to sell to Allied from about $36 million dollars in value in 1979 to about $18 million dollars in value in 1980, and that any contract is executed must have a new clause providing that Exportles was released of any requirement to sell any wood if that wood could not be delivered in the month in which it was purchased.

39. On or about early March of 1980, the Waterman ship "Jefferson" arrived in Leningrad to pick up Allied wood and transport it back to the United States.

40. Thereafter, Waterman, through its agents, servants or employees, informed Allied that they would not transport its wood from Leningrad to the United States because of the conduct of the defendants described in paragraphs 23-36 above.

41. On or about March 13, 1980, the "Jefferson" departed Leningrad without Allied's wood.

42. On or about March 11, 1980, defendant Local 799, through its agent, Edward Connolly, told Allied that it would not unload any cargo arriving from Russia and that until further notice from defendant ILA the boycott of Russian cargoes would continue.

43. On or about March 25, 1980, defendant ILA through its agents, William Hankin and William McNamara, told Allied that until defendant Thomas Gleason ordered otherwise, defendant ILA would continue to refuse to handle Allied wood originating in Russia.

44. At no time material herein has defendant ILA or defendant Local 799 had a labor dispute with Allied, Waterman or any stevedoring company, and at all times material herein the sole and only dispute of defendants ILA and Local 799 has been with the government of Russia.

COUNT I

45. Plaintiff realleges paragraphs 1 through 44 above.

46. By the acts and conduct set forth above in paragraphs 1-44 above defendants ILA and Local 799 induced and encouraged individuals employed by Allied, or by Waterman, or by stevedoring companies operating in the port of Boston and elsewhere which are utilized by Waterman or Allied, to engage in strikes or refusals in the course of their employment to use, manufacture, process, transport or otherwise handle or work on any goods, articles, materials or commodities, or to perform services, and have threatened, coerced and restrained Waterman, Allied and stevedoring companies operating in the port of

Boston, and elsewhere, and other persons engaged in commerce or in industries affecting commerce.

47. An object of defendants' acts and conduct described in paragraph 46 above, was, and is, to force or require stevedoring companies operating in the port of Boston and elsewhere to cease doing business with Waterman and Allied, or any other person, and/or to force or require Waterman to cease doing business with Allied, or any other person; and/or to force or require Waterman, Allied, and stevedoring companies operating in the port of Boston or elsewhere, or any other person, to cease using, selling, handling, transporting or otherwise dealing in the products of Russia, or any other person, and/or to force or require Allied, Waterman or stevedoring companies to cease doing business with Russia, or with other persons, all of which is in furtherance of their boycott of products intended for import from Russia.

48. The acts and conduct described in paragraphs 46 through 47 above are unlawful and in violation of the provisions of 29 U.S.C. Section 168(b)(4)(B) and therefore in violation of 29 U.S.C. Section 187.

49. As a result of the aforesaid conduct of defendant ILA and defendant Local 799, Allied has been damaged in the amount of $5 million dollars to date and faces prospective damage of upwards of $10 million dollars.

COUNT II

50. Plaintiff incorporates and realleges paragraphs 1 through 44, above.

51. Defendants' conduct aforesaid constitutes an intentional, malicious, wrongful or illegal interference with Allied's contractual relations with Waterman, Exportles and "S" and an illegal interference with the business relations of Allied with Waterman, Exportles and "S" of prospective advantages to Allied all involving the traffic of Allied's goods on the high seas.

52. As a result of defendants' conduct aforesaid, Allied has been damaged in the amount of $5 million dollars to date and faces prospective damages of upwards of $10 million dollars.

COUNT III

53. Plaintiff incorporates and realleges paragraphs 1 through 44, above.

54. The conduct of defendants aforesaid constitutes an illegal conspiracy between themselves and members and other affiliates of the defendant ILA and/or between themselves and Waterman, its agents, servants and employees and/or between themselves and various stevedoring employers in various Atlantic and Gulf coast ports in violation of the Sherman and Clayton Antitrust Acts, 15 U.S.C. Sections 1 and 15.

55. The conspiracy described in paragraph 54 above has resulted in damages to date to plaintiff in the amount of $5 million dollars and prospective damages of upwards of $10 million dollars, and plaintiff is entitled to treble damages and attorneys' fees thereon.

WHEREFORE, Plaintiff requests that:

1. a preliminary injunction issue enjoining defendants, their agents, servants, employees, attorneys, and all members and persons acting in concert or participation with them from

(a) interfering with Allied's existing or prospective advantageous contractual relations with Exportles or any other agency of the Russian government, Waterman or any other carrier, or any other person or entity, by threatening to refuse or refusing to provide crews for the purpose of docking or unloading any vessels of Waterman or any other carrier, regardless of nationality of registry or ownership, carrying any of Allied's cargo originating in Russia or elsewhere or by in any manner or by any means including orders, directives, requests or appeals, however given, made or imparted, or by any like or related acts or conduct, or by permitting any such to remain in existence or in effect, engaging in, or inducing or encouraging any individual employed by Waterman, any stevedoring company, or any other person to refuse to handle Allied cargo originating in Russia or elsewhere.

(b) from conspiring and agreeing among themselves and with other local unions and members of Defendant International and/or with Waterman and any stevedoring company or companies to restrain trade between Allied and Exportles or any other agency of the Russian government, Waterman, or any other carrier, or any other person or entity by conspiring and agreeing to refuse to handle Allied cargo originating in Russia or elsewhere and by conspiring and agreeing to threaten with economic

or other reprisal any other person or entity who does handle or seeks to handle such cargo.

2. After a hearing on the merits, a permanent injunction issue enjoining defendants, their agents, servants, employees, attorney, and all members and persons acting in concert or participation with them from

(a) interfering with Allied's existing or prospective advantageous contractual relations with Exportles or any other agency of the Russian government, Waterman or any other carrier, or any other person or entity, by threatening to refuse or refusing to provide crews for the purpose of docking or unloading any vessel of Waterman or any other carrier, regardless of nationality of registry or ownership, carrying any of Allied's cargo originating in Russia or elsewhere or by in any manner or by any means including orders, directives, requests or appeals, however given, made or imparted, or by any like or related acts or conduct, or by permitting any such to remain in existence or in effect, engaging in, or inducing or encouraging any individual employed by Waterman, any stevedoring company, or any other person to refuse to handle Allied cargo originating in Russia or elsewhere.

(b) from conspiring and agreeing among themselves and with other local unions and members of Defendant International and/or with Waterman and any stevedoring company or companies to restrain trade between Allied and Exportles or any other agency of the Russian government, Waterman, or any other carrier, or any other person or entity by conspiring and agreeing to refuse to handle Allied

cargo originating in Russia or elsewhere and by conspiring and agreeing to threaten with economic or other reprisal any other person or entity who does handle or seeks to handle such cargo.

3. After a hearing on the merits, a money judgment issue against defendants indemnifying plaintiffs for their loss plus interest and costs, and attorneys' fees and treble damages pursuant to Count III of the Complaint.

4. For whatever other relief the Court deems meet and just.

ALLIED INTERNATIONAL, INC.,

By its attorneys,

/s/ DANIELLE E. DEBENEDICTIS

DANIELLE E. DEBENEDICTIS
DUANE R. BATISTA
NUTTER, MCCLENNEN & FISH
Federal Reserve Plaza
600 Atlantic Avenue
Boston, MA 02210
(617) 973-9700

Dated: March 28, 1980

Opinion of Court of Appeals

The Opinion of the Court of Appeals appears in Appendix A to the Petition for a Writ of Certiorari at 1a-37a.

Opinion of District Court

The Opinion of the District Court appears in the separately bound Appendix C to Petition for Writ of Certiorari at 99a-108a.

Judgment of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 80-1425

ALLIED INTERNATIONAL, INC.,

Plaintiff-Appellant,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*,

Defendants-Appellees.

JUDGMENT

Entered: January 6, 1981

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The district court's dismissal of Count I of the Complaint is vacated and the case is remanded for further consideration of Allied's prayer for damages and preliminary and permanent injunctive relief; and

The district court's dismissal of Counts II and III of the Complaint is affirmed.

One half costs to appellant.

Costs to appellant are taxed at $292.88

Judgment of Court of Appeals

Certified and issued as informal mandate under F.R.A.P. 41 on Jan 27 1981

/s/ DANA H. GALLUP,
Clerk

By the Court:

/s/ DANA H. GALLUP
Clerk

Affidavit of Morton S. Waldfogel

1. I, MORTON S. WALDFOGEL, herein depose as follows:

2. I am Treasurer of Allied International, Inc.

3. Pursuant to contract with V/O Exportles, an agency of the Russian government, Allied purchases birch plywood, Alder plywood and one-eighth inch standard hardboard from Exportles, and sells these products throughout the United States.

4. The birch plywood purchased from Exportles and sold by Allied is a unique product with the registered trademark "Baltic Birch". Because of the uniqueness of Russian trees and processing methods, Baltic Birch has a combination of features found in no other birch plywood sold in the United States. These features are:

(1) It is all birch.

(2) It is made with one piece faces and all one piece innerplies.

(3) It is uniformly light in color.

The only roughly comparable product comes from Finland, and it lacks the features of being all birch and all one piece face and one piece innerply. Allied brochures further describing Baltic Birch are attached as Exhibits A, B, C, and D to this Affidavit.

5. Allied has been importing and selling Baltic Birch since 1967. Throughout this time Allied has followed a conservative marketing strategy such that it never contracted to sell any Baltic Birch without having the product already physically in the United States. As a result Allied

has developed an excellent reputation for dependability among its customers. This reputation for dependability plus the high quality and trademark uniqueness of Baltic Birch has resulted in many of Allied's customers being willing to specify to their customers that their products will contain Baltic Birch.

6. As a result of the boycott of the ILA starting in January, 1980, Exportles has reduced the amount of Baltic Birch that it is willing to commit to sell to Allied to one-third the amount that it had agreed to commit prior to the boycott. This amounts to about 8 to 10 million dollars worth of product per-year that will be lost.

7. Allied is in the process of trying to arrange to begin to have this limited contract amount shipped to Canada, and then transported overland into the United States. However, doing this involves much higher costs than direct shipment to Boston and other Atlantic and Gulf Coast ports, and has necessitated a substantial price rise.

8. The combination of short supply of Baltic Birch plus unexpectedly higher price for the limited amount that might be available has caused and is causing hardship to those Allied customers nation-wide who have already made contracts with their customers for supplying product that specifies Baltic Birch. They will either be unable to fulfill their commitments or will only be able to fulfill them at a loss.

For example, pianos produced by Baldwin and most quality U.S. piano manufacturers use and specify Baltic Birch. Childcraft & Creative Playthings (a division of CBS), sell toys at shows or by catalog that specify Baltic Birch. Furniture manufacturers and kitchen cabinet manu-

facturers who are Allied customers have similarly already committed themselves at shows or by catalog to their customers to use Baltic Birch in their finished product. Boston University has specified that Baltic Birch be used in a major furniture order.

9. Allied's reputation with its customers for dependability has suffered greatly, and its customers willingness to continue to use, and/or agree to specifications requiring Baltic Birch has already diminished and will continue to diminish to an extent that is not possible to ascertain precisely unless Allied is able promptly to increase its supply and reduce its inbound costs.

10. The one-eighth inch standard hardboard purchased from Exportles and sold by Allied represented last year about 90% of the imports of this product sold in the U.S. and about 50% of the total amount of this product sold in the U.S.

11. The one-eighth inch standard hardboard has three basic markets. These are:

(1) *Fabricator market* using principally *King size*—This is a unique variation introduced by Allied. It is used by fabricators in different industries. One use is in the back of television sets.

(2) *Paneling market* using principally *4 by 8*—This size is also sold to fabricators as well.

(3) *Resale market*—Product is also to lumber yards for their resale to their customers.

12. As a result of the boycott by the ILA starting in January, 1980, Exportles reduced by 40% the amount of

hardboard it was willing to commit to Allied. Because of the continuation of the boycott Allied and Exportles will be forced to reduce this figure even further. If the boycott continues I anticipate the actual reduction will amount to about 12 to 15 million dollars worth of product annually.

13. Allied is in the process of having hardboard shipped from Russia via the Panama Canal to Los Angeles. However, the increased cost of this long voyage will increase the cost of this hardboard by about 15%, and make it difficult to sell in the competitive market. Other hardboard is expected to be brought into Canada and sold at cost (not including overhead), in Canada and only a small quantity is expected to be brought from Canada overland to Boston since the landed cost of this cargo is prohibitive.

14. As a result of tbe boycott Allied is in the process of losing major customers with whom it has cultivated a regular business relationship of many years standing. These customers include Holland Southwest and Masonite Corp. Holland Southwest for the past 4 or 5 years has purchased 2.5 to 3.0 million feet a month from Allied and Masonite has purchased about 100 million square feet annually.

Both of these companies are now being supplied exclusively by Allied's competitors. Allied's ability to compete in selling and servicing its hardboard customers is dependent in large part upon an organization of independent representatives that has taken years to develop. Because of the reduced quantities and the high cost of bringing in the limited available supply, this organization is beginning to disintegrate.

Affidavit of Morton S. Waldfogel

15. Allied cannot obtain a significant amount of hardboard from sources other than Russia because industry practice and history is that hardboard is supplied to importers like Allied pursuant to long term requirements contracts, and it takes years to build up the contacts with and confidence of a supplier so as to be able to obtain a regular substantial supply at a competitive cost.

/s/ MORTON S. WALDFOGEL
Morton S. Waldfogel, Treasurer
Allied International, Inc.

Subscribed and Sworn to this 19th day of May, 1980, in Middlesex County, Massachusetts.

(illegible)
Notary Public
My commission expires: October 26, 1984

Affidavit of Morton S. Waldfogel

1. I, Morton S. Waldfogel, herein depose as follows:

2. I am Treasurer of Allied International, Inc.

3. Article 40 of the collective bargaining agreement between the Boston Shipping Association, Inc., and the International Longshoreman's Association and its locals 799, 800 and 805 in effect from October 1, 1977 through September 30, 1980 is entitle "Prohibition of Lockouts, Strikes or Work Stoppages". The Article reads as follows:

> "The Employers agree that there shall be no lockout or work stoppage by the Employers, and the Union agrees that there shall be no strike or work stoppage by the employees. The right of the employees not to cross a bona-fide picket line is recognized by the Employers."

4. On several occasions from on or about January 10, 1980 to date I have spoken with Arthur Lane, President of Boston Shipping Association, Inc., about the inability of Allied to move its cargo from Russia through the port of Boston as a result of the ILA boycott of Russian cargo. I described to him our problems in this regard with the Waterman ships Walton, Middleton, and Jefferson. I suggested to Mr. Lane that the Shipping Association seek an injunction, take other legal action against the ILA, or otherwise make arrangements to have our cargo unloaded in Boston. Mr. Lane told me that while the Shipping Association sympathized with our problem, it did not wish to take any legal action against the ILA or any of its

locals in regard to our problem. Mr. Lane suggested no other way that our cargo could be unloaded in Boston.

/s/ MORTON S. WALDFOGEL
Morton S. Waldfogel, Treasurer
Allied International, Inc.

Subscribed and Sworn to this 23rd day of May, 1980, in Middlesex County, Massachusetts.

(illegible)
Notary Public
My commission expires: October 26, 1984

Affidavit of Morton S. Waldfogel

I, MORTON S. WALDFOGEL, herein depose as follows:

I am Treasurer of Allied International, Inc.

On February 25/27/28, 1980, I spoke on the telephone with Ray Feeney. Mr. Feeney, who is located in New Orleans, is Waterman Steamship Lines' Russian Service Manager. I attempted to obtain Mr. Feeney's agreement that Waterman's ship, the Jefferson, be routed from Leningrad to Boston with about 6,000 tons of wood produced in Russia consigned to us to be offloaded in Boston on or about March 20 to 25, 1980. Mr. Feeney told me that Waterman would route the Jefferson to Boston only if, at the time of arrival, they could be assured that the Longshoremen in Boston would unload the cargo. Mr. Feeney said Waterman was taking this position because their stevedores, W. T. Clark, had advised them that the Longshoremen Union would not unload any Waterman vessel with cargo from Russia. Arthur Lane, President of the Boston Shipping Association, told me the same thing. Mr. Feeney said that without assurance that the Jefferson could be unloaded in Boston, Waterman would insist that the Jefferson be routed to Canada for unloading.

Signed under Pains and
Penalties of Perjury

/s/ MORTON S. WALDFOGEL
Morton S. Waldfogel, Treasurer
Allied International, Inc.

Sworn and subscribed to before me this 29th day of February, 1980, in Middlesex County, Massachusetts.

/s/ ROGER M. WILLIAMS
Notary Public
Commission Expires February 7, 1986

Affidavit of Edward J. Gildea

I, EDWARD J. GILDEA herein depose as follows:

1. I am President of Allied International, Inc.

2. On March 12, 1980 I spoke on the telephone with Ed Connolly, Business Agent of Local 799, International Longshoreman's Association. I told Mr. Connolly that I was from Allied, and we had been bringing in Russian cargo for twelve years, and I asked him whether the situation had changed in regard to the boycott of Russian cargo. He said he knew who we were, and that the situation had not changed. I told him that we had brought cargo into Montreal, and that it added to our cost of handling. He agreed with that. In addition, I told him that I had heard that Savannah was now open, and that possibly this would change their picture in Boston. He said that if there was to be any change, it would have to come from Bill Hankin, the International Vice-President in Boston. He said he thought that Mr. Hankin would have to clear any change with International President, Thomas Gleason, in New York. He said that he would ask Mr. Hankin to phone me.

Signed under Pains and
Penalties of Perjury

/s/ EDWARD J. GILDEA
Edward J. Gildea, President,
Allied International, Inc.

Sworn and subscribed to before me this 12th day of March, 1980 in Middlesex County, Massachusetts.

/s/ ROGER M. WILLIAMS
Notary Public
Commission Expires February 7, 1986

Affidavit of Edward J. Gildea

I, EDWARD J. GILDEA, hereby depose and say as follows:

I have been the President of Allied International, Inc., since its inception in 1967. Allied International, Inc., (hereinafter called Allied) is a Massachusetts corporation with its principal place of business at 490 Rear Rutherford Avenue, Charlestown, Massachusetts 02129. It is engaged in the import, purchase and sale at wholesale and retail of wood products. It annually imports into the Commonwealth of Massachusetts wood products valued in excess of $50,000.00 directly from foreign countries. It annually ships wood products valued in excess of $50,000.00 from within the Commonwealth of Massachusettts directly to points located in states other than the Commonwealth of Massachusetts. It receives gross annual revenues from the retail sale of wood products in excess of $500,000.00.

Allied has been importing Plywood and Hardboard from the Union of Soviet Socialist Republics (hereinafter called U.S.S.R.) since 1967. The dollar value of such imports in calendar year 1979 totalled approximately $25 million, which is approximately 50%, or slightly more, of the total of Allied's purchases during that year. Allied supplies approximately 80% of the total imports of all imported Birch Plywood in the United States. Included among its customers are Holland Southwest Corporation, located in Houston, Texas, a manufacturer of Prefinished wall panels which employs about 50 people. Holland receives approximately 100% of its raw material from Allied. Its last shipment was received in December of 1979, and it has been unable to obtain additional shipments from Allied due to the boycott of Russian cargo by the I.L.A. Dealers Imports, of Huntersville, North Carolina is also a customer of Allied. It is a wholesale distributor which re-

ceives approximately 90% of its supplies from Allied. As with Holland Southwest, Allied has been unable to supply Dealers Imports with any materials since December of 1979.

Allied's purchases of Birch Plywood and Hardboard from the U.S.S.R. have been made pursuant to a contract between Allied and V/O "Exportles" (herein called V/OE), an Agency of the U.S.S.R. government. The last contract between Allied and V/OE expired on December 31, 1979. A contract to succeed the expired contract and to provide for the continued purchase of Plywood and Hardboard from V/OE by Allied has been negotiated between Allied and V/OE. It has been executed by Allied and is awaiting execution by V/OE. The effective term of this contract is February 9, 1980 to December 31, 1980.

The transportation for the Plywood and Hardboard purchased by Allied from V/OE was arranged pursuant to a contract between Allied and Sojuzvneshtrans (hereinafter called "S"), an Agency of the Government of the U.S.S.R. Pursuant to this contract, which is still in effect, "S" arranged for the shipment of some of Allied's Plywood and Hardboard onboard the vessels of Waterman Steamship Lines. Inc., "The Walton", "The Middleton" and "The Jefferson". Waterman's transport of Allied's Plywood and Hardboard was carried out pursuant to a contract between Waterman and Sofract, an Agency of the U.S.S.R. Government. The essential terms and conditions of Waterman's transport of Allied's cargo (price, destination and shipping schedules) were negotiated directly between Waterman and Allied. This relationship between Waterman and Allied has existed for the past five to six years. Waterman's transport of Allied's cargo has required the virtually exclusive use of "The Walton", "The Middleton" and "The Jefferson" during this period of time.

Affidavit of Edward J. Gildea

Waterman Steamship Lines maintains its principal place of business in New York, New York. It is engaged in the business of transporting freight to, from and among foreign and domestic ports, through the operation of various ocean-going vessels of the United States Registry, including "The Walton", "The Middleton" and "The Jefferson". It annually derives gross revenues in excess of $50,000.00 from the operation of these ocean-going vessels.

For the past five or six years, Waterman has made exclusive use of John T. Clark & Son of Boston, Inc., as its stevedoring company in the Port of Boston. Clark annually performs services for Waterman as well as other carriers valued in excess of $50,000.00 per year.

On or about January 9, 1980, "The Walton" arrived at the Port of Boston to unload a portion of Allied's Plywood and Hardboard purchased from V/OE. "The Walton" was scheduled to make additional calls at the Ports of Wilmington, North Carolina, Charleston, South Carolina and Houston, Texas for further unloading of Allied's Plywood and Hardboard cargo purchased from V/OE. On January 9, 1980, Thomas W. Gleason, President of the International Longshoremen's Association, declared that members of his organization would no longer unload any Russian cargo. Shortly after Gleason made that statement, I was called by Raymond Feeney, an Agent for Waterman Steamship Lines, and advised by him that because of the boycott announced by the I.L.A., Waterman was going to cancel all of "The Walton's" calls scheduled beyond the Port of Boston and was going to unload all of Allied's Plywood and Hardboard cargo in the Port of Boston. Waterman did unload all of the Plywood and Hardboard cargo in the Port of Boston, approximately 500,000 sheets of Hardboard, for Southern Ports is still located in the port. As a

consequence of the material being stored in the Port of Boston rather than being delivered to its customers in the southern United States, there are ongoing demurrage charges accruing at Castle Island in the Port of Boston, which are presently unknown, as well as weekly charges of $5,000.00 for services performed by I.L.A. members in ensuring the security of the Hardboard that is stored at Commonwealth Pier.

Shortly after my conversation with Mr. Feeney, I called Thomas Gleason at the I.L.A. office in New York. He wasn't in but returned the call to Allied in Boston. I explained to Gleason that the majority of our business was bringing in Russian products, and advised him of the situation concerning "The Walton". I then asked him if it would be possible to have "The Walton" unloaded at its scheduled ports of call in the southern part of the United States. Gleason said that it would not be possible to do that. When I asked why not and observed that it seemed illogical to unload in Boston but not elsewhere, he said that he had to "draw the line somewhere." He further stated that it was not his decision or his associates' decision to refuse to unload Russian cargo, but that this was something that was the desire of the rank and file.

On or about January 11, 1980, "The Middleton" was receiving Allied's Plywood and Hardboard cargo in the Port of Leningrad, U.S.S.R. "The Middleton" was scheduled to deliver that cargo to the Ports of Boston, Wilmington, North Carolina, New Orleans, Louisiana and Houston, Texas.

On or about a date between January 11 and January 20, 1980, I was advised by Morton Waldfogel, Vice President of Allied, that Waterman had informed him that it would not deliver "The Middleton" cargo to Boston but would,

instead, deliver it to Montreal, Canada. Attached as Exhibit "A" is a telex from Waterman to Allied, received by Allied on approximately January 20, 1980, in which Waterman confirms its refusal to deliver "The Middleton" cargo to Boston and its intention to deliver it to Montreal, Canada. Attached as Exhibit "B" is a telex from Waterman to Allied, received by Allied on or about January 11, 1980, advising of Waterman's discharge of "The Walton's" cargo in Boston. Attached as Exhibit "C" is Allied's telex to Waterman sent on or abort January 11, 1980, concerning its actions in diverting "The Walton" and "The Middleton".

On or about January 16, 1980, "The Middleton" left Leningrad with approximately one-third (⅓) of the scheduled cargo of Allied's that it was supposed to carry. Instead of arriving in the United States ports, it arrived in Montreal, Canada on or about January 28, 1980. In conversations with Raymond Feeney after January 16, 1980, he advised Allied that the reason Waterman reduced the size of "The Middleton's" load and the reason it went to Montreal was because of the I.L.A.'s boycott of Russian cargoes in the United States. A further effect of the diversion of "The Middleton's" cargo to Montreal as well as the unloading of "The Walton's" cargo in Boston is that for Allied to transport this cargo to its original buyers would cost Allied approximately $400,000.00, as a conservative figure, for the transportation costs.

Between January 25, 1980 and March 13, 1980, Allied negotiated and concluded an agreement with Waterman, providing for "The Jefferson's" transport of Allied's Plywood cargo from the U.S.S.R. to the Port of Boston, or in the alternative to the Port of St. John's, New Brunswick, Canada, in the event that the Port of Boston remained closed by the I.L.A. boycott.

Affidavit of Edward J. Gildea

During the week of March 10, 1980, I had a series of telephone conversations with Mr. Raymond Feeney, Agent for Waterman Steamship Lines, concerning Waterman's agreement with Allied International for the shipment of Plywood and Hardwood from Leningrad, Russia to Boston, Massachusetts on Waterman's ship, "The Jefferson".

In the course of these conversations, Mr. Feeney informed me that, because of the I.L.A. boycott of Russian-made goods, Waterman would definitely not route "The Jefferson" to Boston with this Plywood and Hardboard onboard.

In an effort to obtain alternative routing, I then had an assistant contact one Mr. Rollison, Port Director for Savannah, Georgia, in order to ascertain whether the Port of Savannah was "open" for unloading Russian-made goods. Mr. Rollison reported that Savannah was indeed "open", and that if the Plywood and Hardboard were routed there, it would be unloaded.

I again spoke with Mr. Feeney and, after informing him of Mr. Rollison's assurances, suggested as an emergency measure that "The Jefferson" discharge its shipment of Plywood in St. John's, New Brunswick for transhipment to Boston and its shipment of Hardboard in Savannah.

In a telephone conversation which took place on or about March 13, 1980, Mr. Feeney told me that Waterman would definitely not agree to discharging any of the cargo in question in any port in the U.S. East or Gulf Coasts. Mr. Feeney also notified me that later the same day, "The Jefferson" was departing from Leningrad without any shipment of Plywood or Hardboard onboard. It is my understanding that Waterman suffered a loss of revenue of approximately $200,000.00 to $300,000.00 because of this action.

Affidavit of Edward J. Gildea

I am currently attempting to obtain alternative shipping arrangements with Finn Lines and other European shipping companies, which contacts have been made necessary by Waterman's decision not to transport the cargo as it had agreed.

It is essential that the entire Plywood cargoes be discharged in the Port of Boston, because Allied's principal warehouse for Russian-imported products is located in that city. It would, therefore, be highly impractical and costly from a business standpoint to fill orders for such products on the basis of unbalanced and partial inventories resulting from the discharge of the cargoes in any other port.

Allied has concluded arrangements with V/OE for the delivery of Allied's Plywood and Hardboard cargoes, which were to be carried on "The Jefferson", as well as other Plywood and Hardboard, from the U.S.S.R. to Boston onboard two vessels of U.S.S.R. Registry, the "S. Kovalev" and the "S. Borudulin", which are scheduled to arrive in the Port of Boston in or about late April or early May, 1980.

On March 11, 1980, I called the office of Local #799, International Longshoremen's Association, in Boston, and asked for Business Agent, Edward Connolly. The person answering the telephone advised me that he was not in but suggested that I call back later. I called again on March 12, 1980; I again asked for Business Agent, Edward Connolly, and the person answering the telephone said, "Ed, there's a call for you." Edward Connolly then got on the telephone and identified himself as such.

I told Mr. Connolly that I was from Allied, and we had been bringing in Russian cargo for twelve years, and I asked him whether the situation had changed in regard to the boycott of Russian cargo. He said he knew who we were, and that the situation had not changed. I told him that we had brought cargo into Montreal, and that it added

to our cost of handling. He agreed with that. In addition, I told him that I had heard that Savannah was now open, and that possibly this would change their picture in Boston. He said that if there was to be any change, it would have to come from Bill Hankin, the International Vice-President in Boston. He said he thought that Mr. Hankin would have to clear any change with International President, Thomas Gleason, in New York. He said that he would ask Mr. Hankin to phone me.

During negotiations for the contract between Allied and V/OE, referred to above, to provide for Allied's purchase of Plywood and Hardboard during 1980, V/OE expressed great concern regarding the ability of Allied to have its cargo landed in the Port of Boston or any other U.S. port as the result of the I.L.A. boycott. As a consequence of that boycott, they insisted upon inserting in the contract a provision providing that they could cancel their obligation to furnish any Plywood or Hardboard during a calendar month, if that Plywood or Hardboard could not be delivered during the month in which it was purchased. In addition, as a result of the I.L.A. boycott, V/OE has reduced the quantity of Plywood and Hardboard which it will sell to Allied during 1980 to one-half (½) of the amount sold to Allied during 1979.

/s/ Edward J. Gildea
Edward J. Gildea, President
Allied International, Inc.

Subscribed and Sworn to this 25th day of March, 1980 in Middlesex County, Massachusetts.

Roger M. Williams
Notary Public
My commission expires February 7, 1986

Exhibit A

ALLPLY BSN

WATERMAN NYK

4:5ø PM

TO ALLIED INTL—BOSTON—ATTN MR J MANDELL

FM WATERMAN NYK

øø1-43

REF S.S. A MIDDLETON V26 LENN/BOS BL 1ø,11,13,14,15, 19,16,18-
528 BDLS PLYWOOD.
LENN/NOLA BL 3,4,5, 6 and 7 82ø BUNDLES HARDBOARD.
LENN/HOUSTON BL:9-95ø BUNDLES HARDBOARD.

ARTHUR MIDDLETON, VOYAGE 26 WESTBOUND

THIS IS TO CONFIRM OUR PREVIOUS ADVICES THAT DUE TO THE REFUSAL OF THE INTERNATIONAL LONGSHOREMEN'S ASSOCIATION TO DISCHARGE CARGOES ORIGINATING IN RUSSIA AT U.S. ATLANTIC OR GULF PORTS WATERMAN STEAMSHIP CORPORATION HAS ELECTED TO DISCHARGE THE SUBJECT SHIPMENT(S) AT MONTREAL UNDER AUTHORITY OR OUR LIBERTIES CLAUSE (CLAUSE 11) IN OUR BILL OF LADING. PURSUANT TO THE PROVISIONS OF THIS CLAUSE, ALL TRANSSHIPMENT CHARGES AND STORAGE CHARGES AFTER THE EXPIRATION OF APPLICABLE FREE TIME, ARE FOR THE ACCOUNT OF CARGO.

OUR MONTREAL AGENT, R.G. REDBURN EASTERN LTD., TELEPHONE 514-842-1723 WILL BE AVAILABLE TO RENDER EVERY POSSIBLE ASSISTANCE. WE TRUST YOU APPRECIATE THESE ACTIONS ARE NECESSITATED BY CIRCUMSTANCES BEYOND OUR CONTROL, AND WE DEEPLY REGRET ANY INCONVENIENCE.

FEENEY

ALLPLY BSN

WATERMAN NYK

M

Exhibit B

ALLPLY BSN
WATERMAN NLN

NEW ORLEANS, LA. JAN. 11, 198ø 1215

TO: ALLIED INTERNATIONAL
TELEX 94-ø719 (ALLPLY BSTN)
RE: S/S GEO. WALTON V-21 WB
LENINGRAD/WILMINGTON
SHIPPER: SOJUSVENSHTRANS

B/L—1
1øø BDLS HARDBOARD 82.766 KOGS

B/L—2
5øø BUNDLES HARDBOARD 649.577 KOS

B/L—3
30 BUNDLES HARDBOARD 38.974 KOS

B/L—4
5øø BUNDLES HARDBOARD 649.577 KOS

LENINGRAD/CHARLESTON
SHIPPER: SOJUSVENSHTRANS

B/L—7
5øø BUNDLES HARDBOARD 413.828 KOS

B/L—8
5øø " " 413.828 KOS

B/L—9
5øø " " 413.828 KOS

B B/L 1ø
228 " " 188.7ø6 KOS

B/L 11
375 " " 37ø.371 KOS

B/L 12
473 " " 391.481 KOS

LENINGRAD/HOUSTON SHIPPER: SOJUSVENSHTRANS

B/L—5
9øø BUNDLES HARDBOARD 744.889 KOS

B/L—6
3øø " " 248.296 KOS

Exhibit B

DUE TO INTERNATIONAL LONGSHOREMEN'S ASSOCIATION'S PUBLICALLY ANNOUNCED REFUSAL TO DISDLE RUSSIAN CARGOES, WE ARE COMPELLED TO DISCHARGE ALL RUSSIAN CARGOES ABOARD THE GEORGE WALTON AT THE PORT OF BOSTON PURSUANT TO CLAUSE 11 "LIBERTIES CLAUSE" OF WATERMAN'S BILL OF LADING. ACCORDINGLY THE VOYAGE IS TERMINATED WITH RESPECT TO THESE RUSSIAN CARGOES AT BOSTON. UPON EXPIRATION OF FREE TIME ALL STORAGE CHARGES ARE FOR THE ACCOUNT OF CARGO. ALSO ALL TRANSSHIPMENT OR ONCARRIAGE CHARGES ARE FOR THE ACCOUNT OF CARGO.

WATERMAN AND ITS BOSTON AGENTS PEABODY AND LANE, INC., 89 BROAD STREET, BOSTON, MASS. ø211ø, TELEX PEALANE, TELEPHONE (617) 292-475ø, WILL PROVIDE ANY AND ALL ASSISTANCE REQUIRED TO FACILITATE AND EFFECT ALTERNATE DELIVERY OF CARGOES. WE REGRET ANY INCONVENIENCE CAUSED BY THIS ACTION WHICH WAS DICTATED BY CIRCUMSTANCES BEYOND OUR CONTROL.

WATERMAN STEAMSHIP CORPORATION

ILPLY BSN

WATERMAN NLN

Exhibit C

WATERMAN NLN

TO: WATERMAN STEAMSHIP LINES

1/ RE: YOUR TELEX JANUARY 11, 198ø
S/S GEORGE WALTON V-21 WB

YOUR PROPOSED DISCHARGE OF WILMINGTON/CHARLESTON/HOUSTON CARGO AT BOSTON IS UNWARRANTED AND UNJUSTIFIED AND CONTRARY TO OUR SPECIFIC REQUESTS. CLAUSE #11 IS NOT APPLICABLE IN THIS SITUATION. WE HOLD YOU COMPLETELY RESPONSIBLE FOR ALL EXPENSES INCURRED TO COMPLETE THE SHIPMENT OF THIS CARGO TO THE DESTINATIONS FOR WHICH IT WAS CONTRACTED. IF YOU CONTINUE TO DISCHARGE CARGO, WE HAVE NO ALTERNATIVE BUT TO PROCEED WITH THE TRANSSHIPMENT AND ON-CARRIAGE OF THE CARGO TO THE DESTINATIONS FOR WHICH YOU CONTRACTED, ALL OF WHICH WILL BE DONE AS JUDICIOUSLY AS POSSIBLE AND AT YOUR SOLE RISK AND EXPENSE. IF YOU WOULD PREFER TO HANDLE THE TRANS-SHIPMENT AND ON-CARRIAGE YOURSELF, PLEASE ADVISE IMMEDIATELY.

2/ RE: S/S ARTHUR MIDDLETON

WE UNDERSTAND THAT THE MIDDLETON IS NOW LOADING AT LENINGRAD AND ACCEPTING CARGO FOR DELIVERY TO BOSTON, MASSACHUSETTS/WILMINGTON, NORTH CAROLINA/NEW ORLEANS, LOUISIANA/HOUSTON, TEXAS. PLEASE BE ADVISED THAT WE ARE NOT PREPARED TO ACCEPT DELIVERY OF THIS CARGO OTHER THAN AT THE SPECIFIC PORTS FOR WHICH THE CARGO IS INTENDED. ANY EXPENSES OF ANY SORT ARISING FROM YOUR FAILURE TO DELIVER THE CARGO ON THE MIDDLETON AS CONTRACTED WILL BE SOLELY FOR YOUR ACCOUNT. IF YOU CANNOT ACCEPT CARGO ON THIS BASIS, THEN DO NOT ACCEPT CARGO AT ALL.

ALLIED INTERNATIONAL
BOSTON, MASSACHUSETTS

WATERMAN NLN

ALLPLY BSN

Affidavit of Edward J. Gildea

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO.

ALLIED INTERNATIONAL, INC.,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*,

Defendants.

AFFIDAVIT

I, EDWARD J. GILDEA, hereby depose and say as follows:

1. I am President of Allied International, Inc.

2. All longshoremen employed in the port of Boston by stevedoring companies are hired through the International Longshoremen's Association hiring hall.

Sworn to under pains and penalties of perjury this 31st day of March, 1980.

/s/ EDWARD J. GILDEA
Edward J. Gildea

Affidavit of John A. Caires

DEPOSITION

On Tuesday, March 25, 1980 at 11:35 AM upon the invitation of Mr. Robert Caulder, Secretary of the Boston Shipping Association, I, John A. Caires, Vice President Marketing for Allied International, Inc. of Charlestown, Massachusetts was introduced to Mr. William A. Hankard and Mr. William R. McNamara, Vice Presidents of The International Longshoremans Association in Boston.

The meeting took place after the close of the monthly meeting between The Boston Shipping Association and officers of the local ILA. Also present were Mr. Arthur Lane, President of the BSA along with several other members as well as Mr. William P. Horohoe, representing the John T. Clark Inc., Stevedores.

I inquired directly of both Mr. Hankard and Mr. McNamara if their position regarding their refusal to handle our Russian Plywood and Hardboard cargoes had altered to which they replied in the negative. They stated the boycott was the dictate of Mr. Thomas L. Gleason, President of the ILA whose instructions they followed.

I proceeded to outline Allied's position, namely we were one of the largest break bulk importers in Boston, bringing in annually around 34,000 tons of Plywood and Hardboard. I further proceeded to outline our distribution to wholesalers throughout the country and commented on the uniqueness of the plywood and the fact that the ILA Boycott was not hurting the Russians at all, but rather American Woodworking Business, many of whom were being forced to shut down completely or cut back production drastically due to lack of product occasioned by the ILA boycott.

Affidavit of John A. Caires

I pointed out that the M/V Arthur Middleton, an American Flag Vessel, which was en route to Boston this January at the time of the boycott had to be diverted to Montreal this creating further problems. Also mentioned by me was the fact that last week 2 Russian vessels were being unloaded and reloaded in the Port of Savannah, Georgia.

I pointedly asked Mr. Hankard and Mr. McNamara what steps we could take to correct a situation which while not harming the Russians, was certainly affecting many small American businesses to which they replied they both were meeting in New York with Mr. Gleason Wednesday, March 26th, at which time they would discuss the embargo as relating to the Port of Boston and advise Mr. Arthur Lane of the results of the discussion. The meeting adjourned at that point.

/s/ JOHN A. CAIRES
JOHN A. CAIRES
Vice President, Marketing

Subscribed and sworn to before me this 25th Day of March 1980 in Middlesex County, Massachusetts

/s/ ROGER M. WILLIAMS
Notary Public
My Commission Expires February 7, 1986

Affidavit of Thomas W. Gleason

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Civil Action No. 80-584-S

ALLIED INTERNATIONAL, INC.,

Plaintiff,

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, et al.,

Defendants.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

THOMAS W. GLEASON, being duly sworn, deposes and says:

1. I am President of the International Longshoremen's Association, AFL-CIO ("ILA"), one of the above-named defendants. I make this affidavit in opposition to plaintiff's present motion for a preliminary injunction herein and in support of defendants' cross motion to dismiss the complaint.

2. Defendants urge that plaintiff's case is so legally defective that it should be dismissed in its entirety. If the complaint should somehow survive, it is manifest that plaintiff has failed to meet the even higher burden placed on a party seeking a preliminary injunction. All of the arguments in defendants' memorandum and the material in this affidavit which are couched in terms of dismissal of the

complaint are doubly significant with respect to the injunction motion, where the onus is on the moving party to establish its right to relief.

3. (a) The complaint should be dismissed insofar as it seeks damages for violation of LMRA §303 (Count I) in that the court has already held that there is no reasonable cause to believe that an unfair labor practice has been committed. In denying the application of the Regional Director of the NLRB for an injunction under NLRA §10(1) in *Walsh* v. *International Longshoremen's Association, AFL-CIO,* Civil Action No. 80-559-S, (D. Mass. April 30, 1980), the court found that defendants' action is political expression and has no secondary objective. Since, at plaintiff's initiative, that proceeding has been consolidated with plaintiff's action, the prior ruling is controlling. The court found that even the minimal burden which the Regional Director faced had not been met. Thus, the primary nature of defendants' action must be taken as established for purposes of a motion to dismiss this private lawsuit and certainly for purposes of a temporary injunction, wherein the burden on plaintiff is far more rigorous than that which the Regional Director failed to meet.

(b) Plaintiff's antitrust action (Count III) must also fall before the court's prior ruling. Defendants' action has already been held to be self-directed and political. It therefore cannot violate the antitrust laws. Plaintiff's allegations of "conspiracy" are totally without substance as demonstrated below.

(c) As shown by defendants' accompanying memorandum of law, plaintiff's common law tort cause of action (Count II) cannot stand. Any state cause of action has been pre-empted by the federal statute plaintiff invokes.

Moreover, any tort claim would rely on the identical factual allegations, which are untenable. It would thus suffer from the same defects as the federal claims. Accordingly this count, too, should be dismissed.

4. Plaintiff displays a certain audacity in pressing its private litigation after this court's ruling in the consolidated case. When plaintiff first moved for a preliminary injunction, the NLRB's application for a 10(1) injunction was still pending. Indeed, plaintiff's memorandum of law (pp. 2, 3 and 8) proceeds on the misplaced confidence that the Regional Director would succeed. When it transpired that this court correctly characterized defendants' actions as political protest by refusing to accept certain work, plaintiff should at the very least have gracefully withdrawn its injunction motion. Instead it seeks a second bite of the apple,—but on grounds even weaker than those urged by the NLRB.

5. (a) The only factual allegation in the complaint which requires any comment is the allegation that defendants "conspired" with Waterman Steamship Lines, Inc. (hereinafter "Waterman") and various stevedoring employers. As defendants' memorandum of law shows, this claim of conspiracy, even if true, would be unavailing in that there is no purpose to restrain trade. However, the allegation of conspiracy is itself defective. It is a purely conclusory allegation, unsupported by alleged facts and obviously inserted for purposes of manufacturing an antitrust claim. Its true nature as mere inference and conclusion is revealed by plaintiff's memorandum in support of the injunction motion. At page 6 plaintiff says: "... *there is reason to believe* that various stevedoring companies and Waterman shipping lines were also involved in their conspiracy

. . . ." The rest of the paragraph details what the "reason to believe" is. It consists solely of the claim that two ships, the Walton and the Middleman [sic], were "diverted" before either ship or before any Waterman ship had actually been subject to any coercive action by the ILA or its locals." This unsworn assertion in the memorandum is contradicted by allegations in the complaint, as will be shown below. But, even if it were true, it is hardly the kind of evidence from which one could infer a conspiracy. It consists of no facts to connect the employers to the union's decision but only a recitation of the employers' response to action already taken. Thus, the so-called allegation of conspiracy is nothing more than a self-serving inference drawn from the unilateral acts of others with no evidence to connect them with defendants. The implausibility of the inference becomes immediately apparent when one remembers that it would equally apply to every ILA direct and secondary employer in the United States except for the handful who have challenged the union's action legally. If on the basis of what plaintiff presents one can find a conspiracy, it is a conspiracy of monumental proportions.

(b) The other allegations of the complaint disprove and negate the characterization of conspiracy. These set out the undisputed history of the ILA action and admit that defendants' *only* dispute is with the government of Russia (¶44). The allegations with respect to Waterman and the stevedore companies (¶¶30-43) show beyond doubt that Waterman and the ILA employers were faced with a *fait accompli* by the unions and did nothing more than acquiesce in a situation in whose creation they had played no part. With respect to the single fact from which plaintiff claims there is "reason to believe" a conspiracy exists, —the diversion of the Walton and the Middleton—the

complaint actually contradicts plaintiff's memorandum of law. The reason why these ships were diverted from their normal route is set forth in ¶¶29-34 of the Complaint. On January 9, 1980, deponent informed *Allied* that ILA longshoremen would not unload the Walton in any port other than Boston (¶29). ILA representatives told Waterman and the stevedores that the Walton would not be serviced in Wilmington, Charleston and Houston (¶¶30, 31, 32). Waterman, upon hearing this, "concluded" that longshoremen in the southern ports would not unload any Allied wood (¶33) and so "agreed" to have the Walton totally unloaded in Boston (¶34). These are plaintiff's own factual allegations. They do not paint the picture of a conspiracy. They simply show both Allied and Waterman being apprised of the ILA's unilateral decision and Waterman making the best of the situation by at least completing the unloading of the Walton in Boston, where the unions consented to service it. The implication in plaintiff's memorandum that Waterman was somehow cooperating with the ILA in advance of any knowledge or refusal to work is completely dispelled. (The same story is given in more detail in the NLRB's memorandum in support of its Petition for a 10(1) injunction in the *Walsh* case, which is already on file with the court, at pp. 3 and 4. It confirms that Waterman was merely reacting, not conspiring or agreeing. It goes so far as to show that it was *Allied's* president who informed deponent "that Waterman had decided to unload all of Allied's cargo in Boston due to the 'ILA' boycott." But the point there is that plaintiff's own complaint shows there was no conspiracy.)

(c) Thus, the only set of facts to which plaintiff can point to in the memorandum to support an inference of conspiracy turns out, as alleged in their pleading, not to

support any such inference. The complaint read as a whole gives the true picture—that the refusal to service Soviet goods was unilateral action by the ILA in which no one else played a part. Waterman's and the stevedores' roles occurred only in the wake of the union's decision. The factual allegations of the complaint must take precedence over plaintiff's contradictory and self-serving allegations of a conspiracy. Consequently the complaint should be dismissed on its face—without the necessity of refutation.

(d) However, to set the record straight and for purposes of defeating the motion for a preliminary injunction in the event that the court should decline to dismiss the case *in toto*, deponent categorically states that no other entity —union, stevedores, shipping company or Waterman—had any part in the ILA's decision with respect to the handling of vessels and cargo going to and from Russia following the Soviet invasion of Afghanistan. This was an internal decision of the union, taken in response to the wishes of its own membership. The decision was made and has been implemented without consultation, much less conspiracy, with outsiders. In its aftermath, some employers have challenged the action, some have acquiesced. Their responses have been taken on their own initiative, without ILA involvement.

(e) Annexed hereto and made a part hereof is an affidavit made and sworn to by John Bowers on May 23, 1980 and submitted to the National Labor Relations Board in connection with its proceeding on Allied's unfair labor charge (Case No. 1-CC-1973). Mr. Bowers is the Executive Vice President of the ILA and also the Chairman of the ILA Committee which oversees and makes determinations with respect to the handling of vessels and cargoes

which longshoremen in ports within the ILA's jurisdiction from Maine to Texas and on the Great Lakes are refusing to handle. While directed primarily at the "secondary boycott" aspects, his affidavit gives the full background of the ILA action and its subsequent implementation. It is thus relevant on the present motions. In sum, it shows how outlandish is any suggestion of conspiracy or restraint of trade.

6. (a) In its memorandum (p. 7) plaintiff raises the spector of thermonuclear warfare and suggests that the ILA action may precipitate escalation of international tensions. It seeks to portray defendants as bumbling vigilantes whose interference with foreign policy must be enjoined. This is pure nonsense. American foreign policy permits trade with Russia. It does not require any individual to engage in such trade. Unlike plaintiff's Soviet customer, the United States remains a free nation with a significant range of individual choice even within the context of foreign policy. Because that policy permits the importation of Russian vodka, no American citizen is obliged to drink vodka.

(b) In short, the ILA asks no more than the rights of every other citizen—to act or not act within the private sphere. Plaintiff itself has the same right. The court can rest confident that, if Allied could get its plywood for 2¢ cheaper somewhere else, it would cease trading with the Soviets at a moment's notice. Nor would Allied in that circumstance give a second thought to foreign policy, escalating world tensions, or thermonuclear holocausts. So, too, within the framework of the law defendants may choose for themselves whether or not they will lend their labor to the Soviet enterprise.

Affidavit of Thomas W. Gleason

7. (a) Finally, deponent urges that the present case is so totally without merit as to be frivolous and vexatious and so to warrant the awarding of counsel fees to defendants. This is doubly true with respect to the motion for a preliminary injunction, which plaintiff has continued to press even after the court had made controlling rulings in the 10(l) proceeding and had denied relief to the Regional Director of the NLRB. Even if the case is not dismissed, costs and attorneys fees on the motion should be granted. Needless to say, defendants have been put to great time and expense in defending both the action and the motion, most of which have gone towards the latter. Given plaintiff's knowledge of the underlying facts and the history of this litigation, the pursuit of their action and injunction motion cannot be said to be in good faith. Defendants should be compensated for the cost of defending against these burdensome and unfounded proceedings.

/s/ THOMAS W. GLEASON
THOMAS W. GLEASON

Sworn to before me this
day of May, 1980.

.....
NOTARY PUBLIC

RAY TARONE
Notary Public, State of New York
No. 24-9484625
Qualified in Kings County
Commission Expires March 30, 1977

Affidavit of John Bowers

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD
FIRST REGION

Case No. 1-CC-1753

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

and

LOCAL 799, ILA, AFL-CIO

and

ALLIED INTERNATIONAL, INC.

STATE OF NEW YORK,
COUNTY OF NEW YORK, *ss.*:

JOHN BOWERS, being duly sworn, deposes and states as follows:

1. I am the Executive Vice President of the International Longshoremen's Association, AFL-CIO. My office is located at the ILA's headquarters at 17 Battery Place, New York, New York 10004. I am also the Chairman of the ILA Committee which oversees and makes determinations with respect to the handling of vessels and cargo which longshoremen in ports within the ILA's jurisdiction from Maine to Texas and on the Great Lakes are refusing to handle as further enunciated within.

2. This affidavit is to give the background to the ILA's current policy with respect to the handling of vessels and cargo going to and from Russia following the Soviet invasion of Afghanistan on December 29, 1979. In order

that the Board can fully comprehend the response of the membership of the ILA to this event, which has been referred to by the present Secretary of State, Mr. Muskie, as "Soviet cannibalism" and as to which the Vice President of the United States, Mr. Mondale, has expressed the unequivocal opposition and alarm of the government in unmistakable terms (see Articles, *The New York Times, Exhibits 1 & 2* hereto), [omitted] I set forth the following background.

3. Traditionally the ILA's membership has been militantly patriotic. Two years before our own government took a stand against the communistic and expansionist policies of Castro's Cuba, longshoremen, on their own accord, bypassed numerous opportunities to supplement their income servicing Cuban ships, because of their personal convictions. Over the years, our members have had very strong personal feelings against the totalitarian regimes, both to the right and to the left of the political spectrum, which historically have repressed trade union movements and have jailed, tortured and harrassed their leaders. Indeed, the ILA has been in the forefront in the labor movement in this country in protesting—and where possible participating in missions—to these countries in order to secure the civil rights of our oppressed brethren, whether in Chile, Russia, Nicaragua, Tunisia or elsewhere. Consistent with these basically subjective sentiments, our members and their leadership have been very sensitive to actions by foreign governments that affect our citizens and the principals for which our country is reknowned. [sic] The ILA's leadership has responded time and again to calls by the President of the United States in both war time and peace time to assist our country and its allies abroad. We have assisted friendly nations to increase their longshore productivity and efficiency in order to bolster the

resources and self-sufficiency of the free world nations in Africa, Southeast Asia and wherever necessary over the globe.

4. It should be noted that, in the past, activities similar to the present ILA action have enjoyed the warm approval of the administration. When, in 1978, the AFL-CIO contemplated a boycott of Chilean trade to protest violations of human rights there (action in which the ILA was in the forefront), the President's foreign policy advisor, Mr. Brzezinski wrote AFL-CIO President George Meany wishing the venture success *(Exhibit 3)*. [Omitted]

5. A typical reaction of longshoremen was that which followed the day after the American hostages were taken by the revolutionary government of Iran. Thomas (Teddy) Gleason, the ILA's President, and I and other ILA officials at our headquarters were deluged with phone calls from local delegates advising that their men did not want to work any Iranian cargo and that they were attempting to stop handling Iranian ships and cargo on their own. At that time there was no ILA position. However, when the members of Locals 1233 and 1235 (Longshoremen) and Local 1 (Checkers) in the Port of New York refused to handle Iranian cargo on vessels at berth in Port Newark, New Jersey, President Gleason, upon a general consensus in other ports as well and to avoid the disruption in the industry and within the union that can follow from individual actions of longshoremen from port to port, expressed a commonly accepted union policy not to handle Iranian vessels. The committee that I chair has since that time overseen the general and specific activities respecting Iranian cargo and has ruled in several instances in order to prevent hardship to shippers and receivers of goods.

I am personally unaware of any instances where locals or their members have sought to vary from that policy. To the contrary, they have encouraged the leadership to continue it and have refused in all cases, to my knowledge, to turn out to handle Iranian cargo. (See Article, *The Journal of Commerce, Exhibit 4* hereto). [Omitted]

6. Immediately following the Russian invasion of Afghanistan President Gleason and I received phone calls from every port from Maine to Texas. This included ports on the Great Lakes, where Russian vessels consist of approximately 85% of the work opportunity available to longshoremen there. Once again, the local delegates advised that the men wanted to take matters into their own hands and were vehemently opposed to servicing any Soviet vessels or cargo coming in to and from the United States. In all instances, they requested an affirmative position by the ILA not to work Russian cargo until the Soviets got out of Afghanistan. The substance of these continuing calls over the following two weeks, as constantly repeated and reinforced by the delegates and members, was that if the Russians were not stopped here and now, they will continue to go on to invade other helpless countries. The men felt that someone had to do something to prevent a repetition of what Germany did to Czechoslovakia just before World War II and what the Russians did to Hungary in 1956, when no one did anything to stand up and protest against what was happening to smaller, weaker countries in the face of overpowering aggressors. Shortly after President Carter threatened a ban against American participation in the Olympics to be held in Moscow, we received further calls from our constituents, later also expressed by Teddy Gleason, that it would be inconsistent to not allow our athletics who trained all their

lives to run and swim in the Olympics and yet to allow

the Russians to earn American dollars to support a system that feeds on aggression.

7. Notwithstanding the urgings of the delegates and members, Mr. Gleason held off for several days from announcing any far-reaching union policy on this subject, in order to ascertain for certain that this sentiment was truly as broad as it appeared. On the one hand, he did not want to have an uncontrollable situation of wildcat-type actions from port to port; on the other hand, if this indeed was the overwhelming feeling of the membership, then its leaders were obliged to give it expression. Mr. Gleason got in touch with all the International Vice Presidents and learned that the membership throughout the ILA's U.S. affiliates were in fact opposed to servicing the Soviets. The only exceptions were the Canadian locals, whose leaders stated that they would work Soviet vessels and cargo, and their wishes have been respected. In the meantime, several other unions and their membership were taking or considering taking similar action, both against Iran and the Soviet Union (see Article, *Washington Post*, January 8, 1980, *Exhibit 5* hereto). [Omitted]

8. The Executive Board of the ILA met on or about January 7 and 8, 1980, to discuss the situation. There was a unanimous consensus that if the ILA did not take a position wildcat actions would follow and, in any event, leaders had an obligation to back the membership. Accordingly, on January 9, 1980, President Gleason, acting on behalf of the Board and consistent with the advice of the ILA's Executive Council, its District and Local Officials and the membership, issued a statement, the text of which is set forth at paragraph 15(a) of the Complaint

and which is attached hereto as Exhibit 6. The statement precisely and accurately reflects what had occurred prior to that date as described above. Consistent with the statement, all cargo that had been in the process of loading or discharging, such as the S.S. Walton in Boston, was permitted to be worked until completion. All other cargo was permitted to be picked up by the shippers or forwarders for their further disposition. (See Articles in *Newsday* and *Chicago Tribune*, January 10, 1980, *Exhibits 7 & 8*). [Omitted]

9. The ILA's so-called directive applies to Russian ships and cargoes "in ports from Maine to Texas and in Puerto Rico where ILA workers are employed". It does not apply to the Canadian provinces, where several organic ILA affiliates are located. The ILA leadership has traditionally respected the autonomy and sentiments of its various affiliates, particularly in matters of personal conscience and where earning capacity is at stake. (See Article, *Montreal Gazette*, January 10, 1980, attached hereto as *Exhibit 9*). [Omitted] I wish to emphasize that at no time was it ever suggested to our Canadian brethren or to any other locals that there would ever be any reprisals if they handled Russian goods or ships. To the contrary, both I and President Gleason expressly made the point that no adverse action would be or should be taken against those locals or members who continued to handle the cargo to and from Russia. It is noted, incidentally, that in the period immediately following the issuance of President Gleason's statement, numerous letters were received from our Canadian members as well as from unaffiliated individuals throughout the country. These not only overwhelmingly expressed their approval for the ILA's action, but in several instances they forwarded money to help the longshoremen who were forfeiting a goodly portion of their income to follow through

on their feelings. (A sampling of this correspondence is set forth at *Exhibits 10-15* annexed hereto). [Omitted]

10. In the period following the directive, we did not receive any requests or pressure to change our policy except by the administration in the particular instance of loading of grain that had been already committed to the Soviet Union. What we did notice, however, was that ILA members and non-members around the country were refusing to handle Soviet ships and cargo, particularly on the Great Lakes. An example is the case of the Soviet vessel "Vasya Shiskowskiy", that went into the Port of Luddington, Michigan on April 27, where non-ILA personnel refused to handle the cargo. In another instance, pilots refused to move a vessel containing Soviet cargo bound for Burns Harbor, Indiana, another port heavily dependent on the U.S.-Russian trade.

11. The ILA and its members have never knowingly stopped others from dealing with Russian vessels and cargo. To the contrary. In the Port of New Orleans, a Russian line sponsors weekly sailings of up to 400 passengers consisting principally of Canadians and Russians and even with some American aboard. At no time have the ILA's locals in that port picketed or in any direct or indirect manner interfered with the operations of those vessels. Mr. McCleland, the ILA Vice President in that area, reports that he could not get his men to service those vessels. However, the line has successfully used its own personnel and even local cabdrivers to move the luggage and other materials on and off of the vessels which have sailed on schedule. No solicitations or pressures were brought upon any such persons to conform to the ILA's own practice in that port. Further, in the Ports of New York and

Baltimore, I and Mr. John Kopp, the International Vice President in Baltimore, were approached by representatives of March Shipping Company, an agent representing Soviet shipping interests, to get our men to load luggage aboard Soviet ships in July and September, 1980 from the passenger terminals in New York and Baltimore. I advised Captain Matto Bozovic that men in New York would not turn out to handle the luggage. At the same time, I advised him that he was at liberty to get his own personnel and to hire whomsoever he wished to handle the baggage and other cargo and that the ILA would not interfere. Mr. Kopp similarly advised him.

12. To the best of my knowledge, orders to service both Iranian and Russian ships and cargoes from and to those countries have been posted in local hiring halls when such work was available. The men have nevertheless refused to respond to those orders. In the Port of New York, for instance, where Guaranteed Annual Income Plan is in effect, they each lost a day's pay, amounting to approximately $80.00, for their failure to report. Furthermore, any men who would report, regardless of whether or not there was sufficient labor available to do the work, could avoid this debit or penalty. This has yet to occur, though no action would be taken against any man if he saw fit to report.

13. It is my understanding that this situation has been repeated in other ports, including the Port of Boston. (See Article, *The Baltimore Sun*, January 23, 1980, *Exhibit 16* attached). [Omitted] Though local ILA representatives have from time to time referred to the ILA directive of January 9, 1980, they have continued to act on their own initiatives consistent with the sentiments of the various

local memberships without any particular prodding or advice from the International's Officers in the New York headquarters. Consistent with the sentiments of the ILA representatives who contacted our headquarters prior to January 9, 1980 and since that time, the longshoremens' refusal to handle Russian goods and vessels and cargo is continuing and will continue until the Soviet Union withdraws its troops from Afghanistan and restores that country's independence and the human and civil rights of its inhabitants. If others, whether they be employers or unions, wish to follow the example of the ILA and other smaller and larger labor organizations in this country which have taken a similar stand, then that is their privilege; but the ILA has not and will not exert any pressure upon them to do so. We, of course, reserve our right to join with other labor movements in this country and throughout the free world in protesting and opposing the Soviet Union's destructive actions. (See Article, *The Boston Globe,* February 20, 1980, *Exhibit 17* attached). [Omitted]

/s/ JOHN BOWERS
JOHN BOWERS
Executive Vice President
International Longshoremen's
Association, AFL-CIO

Sworn to before me this
23rd day of May, 1980.

/s/ HERZL S. EISENSTADT
NOTARY PUBLIC

HERZL S. EISENSTADT
Notary Public, State of New York
No. 24-4514648
Qualified in Kings County
Commission Expires March 30, 1981

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No. 80-1663

In the Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, Local 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, and T.W. GLEASON, Individually and as he is President of International Longshoremen's Association, AFL-CIO and H.R. HASSELGREN, Individually and as he is Secretary-Treasurer of International Longshoremen's Association, AFL-CIO and N.J. BOWERS, Individually and as he is Executive Vice President of International Longshoremen's Association, AFL-CIO and F.R. FIELD, JR., Individually and as he is General Organizer of International Longshoremen's Association, AFL-CIO and A. SCOTTO, Individually and as he is Regional Director of International Longshoremen's Association, AFL-CIO and J.T. MOOCK, Individually and as he is First Vice President of International Longshoremen's Association, AFL-CIO and R.A. MASSEY, Individually and as he is Second Vice President of International Longshoremen's Association, AFL-CIO and G.W. DIXON, Individually and as he is Third Vice President of International Longshoremen's Association, AFL-CIO and W.P. LYNCH, Individually and as he is Fourth Vice President of International Longshoremen's Association, AFL-CIO,

PETITIONERS,

v.

ALLIED INTERNATIONAL, INC.,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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In the
Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1663

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*,
PETITIONERS,

v.

ALLIED INTERNATIONAL, INC.,[1]
RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OR APPEALS FOR THE FIRST CIRCUIT

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

Respondent, Allied International, Inc. ("Allied"), is submitting this Response to Petitioners' Petition for Writ of Certiorari

[1] Allied International, Inc. has one subsidiary, Allied International Sales Corp. In addition, the following are affiliated companies: Allied Plywood Co., Inc.; Allied Plywood Inc.; Allied Plywood Ltd.; Atlas Management Corp.; Harbor Corp.; B.R.S. Plywood Inc.

("ILA petition") pursuant to a request of the court conveyed to Respondent by letter dated May 20, 1981 from its Clerk, Alexander L. Stevas, to Respondent's attorney.

Respondent's Positions

Respondent, Allied, has read in the media[2] that Petitioners have recently terminated the union's Russian boycott which gave rise to the litigation in the instant case. Although Allied's immediate need for injunctive relief may therefore be lessened, damage claims arising out of the International Longshoremen's Association's ("ILA") boycott, and the nationally significant issue of preventing a recurrence of this kind of conduct by the ILA or other unions, still remain. The law is in a state of confusion as to the proper kinds of actions that may be brought to resolve a dispute over a union-instigated work stoppage motivated by that union's political disapproval of an international trade relationship, and the proper forum(s) for resolution of such a dispute. In *New Orleans Steamship Association* v. *General Longshore Workers*, 626 F.2d 455 (5th Cir. 1980), *cert. granted sub. nom. Jacksonville Bulk Terminals, Inc.* v. *ILA*, No. 80-1045, 49 U.S.L.W. 3725 (March 30, 1981), the Court has already granted certiorari to decide one facet of this overall problem, to wit:

> Does union-instigated work stoppage motivated by political disapproval of employer's international trade relationship involve 'labor dispute' within the meaning of § 4 of Norris-LaGuardia Act?

Id. at 3585.

However, *Jacksonville Bulk Terminals Inc.*, *supra*, involves only an action for breach of a collective bargaining agreement under Section 301 of the Labor Management Relations Act of

[2] *See, e.g.*, Wall St. J., June 4, 1981, at 1.

1947, 29 U.S.C. §185(a). See the underlying Court of Appeals opinion, *sub nom. New Orleans Steamship Association* v. *General Longshore Workers*, 626 F.2d 455 (5th Cir. 1980). It does not address the larger questions of the rights of those who are not parties to a collective bargaining agreement with the union, but who are also severely damaged by the work stoppage, or the rights of the public in general to a free flow of commerce unburdened by this sort of disruption. The employers who have collective bargaining agreements with the union instigating the disruption cannot be depended upon to protect the interests of these other persons and the public by bringing Section 301 breach of contract actions. Such employers may well decide that their own best interests are served by not resisting the work stoppage, and thus avoiding the risk of incurring the enmity of the leadership of the large and powerful international union that controls their labor supply.[3]

The issues raised in the ILA petition and in Allied's Cross-Petition for Certiorari in Case No. 80-1906, when coupled with the issues raised in *Jacksonville Bulk Terminals, Inc.*, *supra*, encompass these larger questions as well as all of the main issues that have, to the knowledge of Allied, been raised to date in litigation involving union-instigated work stoppages motivated by union political disapproval of international trade relationships. Allied submits that the interests of all involved in international trade, including even the unions, would be best served if the Court granted the petitions for certiorari, in

[3] For example, in the instant ILA Russian boycott situation, Russian cargo is but a small fraction of the total cargo passing through each of the many ports on the East and Gulf Coasts and Great Lakes whose longshoremen are represented by the ILA. Particularly if the ports are busy, the longshoremen lose little or nothing by refusing to handle Russian cargo, and their stevedoring company employers lose little or nothing. The big losers are persons such as Allied who find all of the deep water ports in the United States, other than those on the West Coast (where another union represents longshoremen), closed to their Russian imports or exports, and the public in general, who is thereby deprived of the economic advantage of Russian trade at competitive prices.

both the instant case and in No. 80-1906, in order to provide a comprehensive determination of rights and obligations in these kinds of disputes.

On the other hand, Allied would oppose the granting of the ILA's petition for certiorari in the instant case unless Allied's cross-petition in No. 80-1906 were also granted. Allied submits that any such partial treatment of the pending legal issues involved in these kinds of disputes may even worsen, rather than improve, the existing state of legal confusion as to proper procedures, forums and remedies. As described in more detail in Allied's cross-petition, No. 80-1906 at 6-10, the major differences below are with respect to the legal reasons for the unlawfulness of the ILA's Russian boycott and the proper forums and procedures for litigation of those issues, rather than with respect to whether the boycott is unlawful. Therefore, to the maximum extent possible, this confusion should be resolved in its entirety.

Responses to Petitioners' Arguments

Allied responds to Petitioners' arguments as follows:

1. In their petition at 6-8, Petitioners argue that the decision of the court below directly conflicts with this Court's decision in *American Radio Association* v. *Mobile Steamship Association*, 419 U.S. 215 (1974) ("Mobile"). Allied sees no such conflict. Allied supports the distinction between the instant case and *Mobile* articulated by the court below. *See* ILA petition at 10a-13a. In addition, there are numerous other relevant distinctions between the two situations including, but not limited to, the following: the union conduct involved in the instant case cannot even arguably be protected by Section 7 of the National Labor Relations Act[4]; such union conduct does not involve any possibility of affecting the labor relations or labor conditions of any foreigners; and the dispute in the

[4] *See* authority cited in Allied's cross-petition, No. 80-1906 at 12.

instant case is with the cargo, rather than the ship, thus rendering irrelevant any concern over NLRB interference with "... the maritime operations of foreign vessels". *Mobile*, 418 U.S. at 228. In *Mobile*, 419 U.S. at 225 n.10, this Court specifically reaffirmed that NLRA secondary boycott provisions can apply to domestic secondary activities arising out of a primary dispute involving foreigners outside of the United States.

2. In their petition at 9-10, Petitioners argue that there is a conflict between circuits with respect to an important question of federal jurisdiction, in that the instant case is in conflict with *Baldovin* v. *ILA*, 626 F.2d 445 (5th Cir. 1980). Allied agrees that such a conflict exists and indeed, has further submitted that the conflict also encompasses *NLRB* v. *ILA*, 332 F.2d 992 (4th Cir. 1964), a case that cannot be reconciled with either *Baldovin* or the instant case. *See* Allied's cross-petition, No. 80-1906 at 6-104. Allied disagrees, however, with Petitioners' assertion that this conflict also necesssarily encompasses *National Maritime Union of America (Shippers Stevedoring Co.)*, 245 N.L.R.B. 29 (1979). Allied submits that the instant case can be distinguished from *Shippers Stevedoring* for many of the same reasons it can be distinguished from *Mobile*, even if it is assumed that *Shippers Stevedoring* was correctly decided. *See* pp. 4-5 *supra*.

3. In their petition at 10-11, Petitioners appear to argue that the well established concept that an object of a union can be determined from the foreseeable consequences of its conduct[5] should not apply to the facts of the instant case because ILA was merely "seeking to regulate its own conduct vis-a-vis the U.S.S.R." Allied submits that this ILA argument is nothing more than semantics. Otherwise, any union, anytime, anywhere, could apply that same "regulating its own conduct" rationale to justify any "hot cargo" type order it issued to its

[5] *NLRB* v. *Retail Store Employees Local 1001*, 100 S. Ct. 2372, 2377 n.9 (1980) and cases cited therein.

members not to handle products of someone with whom it had a dispute. *See* discussion by the court below; Petitioner's petition at 15-16a and cases cited therein.

4. In their petition at 12-14, Petitioners argue that there are important First Amendment issues involved in this case. Allied disagrees. Of all the forums that have considered the issue of a union-instigated work stoppage motivated by disapproval of international trade relationships, only two judges of the Fourth Circuit, seventeen years ago in *NLRB* v. *ILA*, 332 F.2d 993 (4th Cir. 1964), and the district court below, ILA petition at 22-24a[6], have concluded that such question gave rise to a First Amendment problem. Within the last year the Fifth Circuit found no such problem, *New Orleans Steamship Association* v. *ILA*, 626 F.2d at 462-63, and neither the First Circuit majority nor Judge Aldrich found any such problem below. ILA petition at 22-24a, 36-37a. Most recently, the NLRB's administrative law judge also found no such problem. ILA petition at 97a.

An analysis of the reasoning and authority of the panel majority in *NLRB* v. *ILA*, *supra*, shows the clear error of that panel majority in concluding that any First Amendment problem existed. The panel majority first erroneously equated the refusal to handle products, ordered by the union leadership, with the very distinguishable, purely voluntary, decisions of individual consumers to engage in a consumer boycott. *NLRB* v. *ILA*, 332 F.2d at 999. It then further erroneously[7] implied that such union ordered product boycotts for political reasons were "not uncommon". *Id.* It finally cited, as authority for its conclusion that First Amendment protection existed, cases involving rights of unions or civil rights organizations to provide

[6] The District Court below relied essentially upon *NLRB* v. *ILA*, *supra*. *See Walsh* v. *ILA*, 488 F.Supp. 524, 530-531 (D. Mass. 1980) *vacated and remanded with instructions to dismiss on grounds of res judicata*, 630 F.2d 864 (1st Cir. 1980).

[7] The court below correctly pointed out that such union conduct was quite rare in the United States. *See* ILA petition at 21a.

legal services, or the rights of such groups not to disclose the identity of their members, and even cited one case which held that there was insufficient evidence to support a conviction for breach of the peace. *NLRB* v. *ILA*, 332 F.2d at 999 n.6 and cases cited therein.

Obviously, none of these cases come close to supporting the proposition that a union's top leadership has a First Amendment right to wreak havoc on commerce by using the union's power to order every union member (whatever his or her individual beliefs) to refuse to handle product from some nation whose political actions are not favored by that union leadership or some factions within the union. Conduct that is more than "pure speech" is not protected by the First Amendment when the manner of expression is "basically incompatible" with the normal activity of others. *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972).

In sum, Allied submits that the main issue is not whether the ILA's conduct is protected by the First Amendment or is otherwise legal. Rather, the main issue is what legal theory or combination of legal theories properly define the nature and scope of its illegality.

5. Allied objects to Petitioners' statements of its Questions Presented for Review, ILA petition at i, as not fulfilling the requirements of Sup. Ct. R. 21(a). Such Rule states that the questions be expressed in "the terms and circumstances of the case" and be "short and concise and should not be argumentative or repetitious".

Thus, the terms "military aggression", and "aggressor nation" in questions Nos. 1 and 3 respectively are argumentative. Questions Nos. 3 and 5 are not consistent with the terms and circumstances of the case in that they state or imply that the refusal to handle was a result of a mass unanimous affirmative desire of all union members, rather than a result of an order from the union's president to the membership. In general, the questions are fragmented in that each is directed only to a

portion of the overall question of whether there was an unlawful statutory secondary boycott, and they tend to overlap aspects of each other. Based on the form of the statement in *Jacksonville Bulk Terminals, Inc., supra*, Allied suggests the following as a statement of a Question Presented for Review:

> Does union-instigated work stoppage motivated by political disapproval of international trade relationships violate Section 8(b)(4) of the National Labor Relations Act and Section 303 of the Labor-Management Relations Act of 1947?

Conclusion

For the foregoing reasons, Allied submits that the ILA Petition for Writ of Certiorari should be granted, but only if Allied's Cross-Petition Writ of Certiorari, No. 80-1906, is also granted. Otherwise, it should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL., PETITIONERS

v.

ALLIED INTERNATIONAL, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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v.

ALLIED INTERNATIONAL, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case involves the application of the prohibition on secondary boycotts in Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. 158(b)(4), to work stoppages called by the International Longshoremen's Association (ILA) as a protest against the Soviet Union's invasion of Afghanistan. The National Labor Relations Board is responsible for implementing the provisions of the NLRA, and there are currently pending before the Board three cases involving issues substantially identical to the ones presented in this case.[1]

[1]Respondent is the charging party in one of these cases, *Int'l Longshoremen's Ass'n (Allied Int'l, Inc.)*, Case Nos. 1-CC-1753, JD-100-81 (Mar. 16, 1981). See Pet. App. B. The other cases are *Int'l Longshoremen's Ass'n (Occidential Chemical Co.)*, Case Nos. 10-CC-1141-1 *et seq.*, JD-98-81 (Mar. 16, 1981), and *Int'l Longshoremen's Ass'n (Kansas Farm Bureau, et al.)*, Case Nos. 23-CC-764-1 *et seq.*, JD-99-81 (Mar. 16, 1981).

1. On March 31, 1980, respondent Allied International sued petitioners under Section 303 of the Labor-Management Relations Act, 29 U.S.C. 187, in the United States District Court for the District of Massachusetts, seeking injunctive relief and damages (Pet. App. 4a and 101a). It alleged that petitioners violated the prohibition on secondary boycotts in Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. 158(b)(4), by refusing to handle cargo bound to or from the Soviet Union (*ibid.*).[2] The district court dismissed Allied's complaint on the basis of its decision in a consolidated case, *Walsh* v. *Int'l Longshoremen's Ass'n*, 488 F. Supp. 524 (D. Mass. 1980), in which it had held that the refusal of union members "to accept employment on certain ships, as a form of political protest," was "a primary boycott of Russian goods, with incidental effects upon those employers who deal in such goods," and thus that it did not constitute an unlawful secondary boycott (*id.* at 530-531).[3]

The court of appeals in *Walsh* did not reach the merits, for it gave res judicata effect to the denial of the request of another Regional Director of the NLRB for a temporary injunction against the ILA's work stoppage in Texas (see *Baldovin* v. *Int'l Longshoremen's Ass'n*, 626 F. 2d 445 (5th Cir. 1980)), and remanded the district court's decision with directions to vacate and dismiss (*Walsh* v. *Int'l Longshoremen's Ass'n*, 630 F. 2d 864, 875 (1st Cir. 1980).

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[2]Respondent also alleged that petitioners violated the Sherman Act, 15 U.S.C. 1, and tortiously interfered with its contractual relationships (Pet. App. 4a). The court of appeals affirmed dismissal of these claims (Pet. App. 24a-29a). Respondent has filed a cross-petition for a writ of certiorari. *Allied Int'l Inc.* v. *Int'l Longshoremen's Ass'n* No. 80-1906 (filed May 5, 1981).

[3]*Walsh* was a suit by a Regional Director of the National Labor Relations Board for a preliminary injunction, pending Board adjudication of respondent's unfair labor practice charge against the ILA under Section 8(b)(4). See note 1, *supra*.

Because the instant case involved a stranger to the *Baldovin* litigation, however, the court of appeals here reached the merits of respondent's claim and concluded, contrary to the district court, that the ILA's refusal to handle Soviet cargo was a secondary boycott prohibited by Section 8(b)(4) of the NLRA (Pet. App. 24a).

2. Section 8(b)(4) reaches conduct that affects "any person engaged in commerce or in an industry affecting commerce." This Court's decisions have interpreted the "in commerce" requirement in Section 8(b)(4) or other sections of the Act containing similar language as precluding the application of the National Labor Relations Act in a variety of situations in which the dispute involved foreign ships.[4] Petitioners contend that, under those decisions, their work stoppage was not "in commerce" within the meaning of Section 8(b)(4). Although the Fifth Circuit in *Baldovin, supra*, agreed with this analysis, the court below did not.[5] This case thus presents a clear conflict among the circuits on an important issue concerning the scope of the NLRA and the interpretation of this Court's prior decisions. It is accordingly an appropriate case for plenary review by this Court.

3. This case, like *Jacksonville Bulk Terminals, Inc.* v. *ILA*, cert. granted, No. 80-1045 (Mar. 30, 1981), involves the application of the federal labor laws to this ILA's refusal to handle cargo bound for or shipped from the Soviet Union. We submit that the Court should grant the petition

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[4] *American Radio Ass'n* v. *Mobile Steamship Ass'n*, 419 U.S. 215 (1974); *Windward Shipping (London) Ltd.* v. *American Radio Ass'n*, 415 U.S. 104 (1974); *Incres Steamship Co.* v. *Int'l Maritme Workers Union*, 372 U.S. 24 (1963); *Benz* v. *Campania Naviera Hidalgo*, 353 U.S. 138 (1951). Cf. *Int'l Longshoremen's Ass'n, Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195 (1970).

[5] Both circuits agreed that the union's work stoppage otherwise violated the secondary boycott provision (see Pet. App. 8a-24a and *Baldovin, supra*, 626 F. 2d at 449).

for certiorari in this case, and either consolidate it for argument with *Jacksonville* or set the two cases for argument in tandem. The legal issues involved in the two cases, although different, are related. The question presented in *Jacksonville*—whether the ILA's activitiees are a "labor dispute" for purposes of the Norris LaGuardia Act, 29 U.S.C. 104, is similar to the question presented in this case—whether the same activities are "in commerce" and, if so, in violation of Section 8(b)(4) of the NLRA.[6] Moreover, the legal context of each case is usefully amplified by consideration of the other, so that the Court is presented with the full legal implications of the ILA's actions.

The NLRB is presently considering three cases involving issues substantially identical to those raised in this petition (see note 1, *supra*). We will be able to file a brief expressing the views of the United States on the merits of the issues involved in this case once the Board has formulated its position in deciding the cases pending before it. The Board expects to reach its decisions within the next several months, and we would then be able to discuss the issues fully at the merits stage of this case.

Although setting *Jacksonville* for argument with this case might result in some delay in the disposition of that case, we do not believe that the delay would be prejudicial to the parties, since we note that on April 24, 1981, the ILA directed its members to resume normal handling of the Soviet cargos.[7]

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[6]This Court has suggested that the scope of the two statutes may not be identical in this context. *Marine Cooks & Stewards, AFL* v. *Panama Steamship Co.*, 363 U.S. 365, 372 (1960); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 18 (1963).

[7]This voluntary cessation of the challenged conduct does not moot these cases. *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 632 (1953); *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 308-310 (1897); *United States* v. *Phosphate Export Ass'n*, 393 U.S. 199, 202-203 (1968). Cf. *DeFunis* v. *Odegaard*, 416 U.S. 312, 318 (1974).

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted, and that this case should be set for argument with *Jacksonville Bulk Terminals, Inc.* v. *ILA*, No. 80-1045.

WADE H. MCCREE, JR.
Solicitor General

JUNE 1981

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ALEXANDER L. STEVAS,

No. 80-1663

In the Supreme Court of the United States

OCTOBER TERM, 1980

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL., PETITIONERS

v.

ALLIED INTERNATIONAL, INC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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In its initial memorandum, the government indicated that the National Labor Relations Board was considering three cases involving issues substantially identical to those raised in the petition, and that the Board expected to reach its decisions in sufficient time to enable the United States, if the petition were granted, to file a brief expressing its views on the merits of the issues presented. On August 28, 1981, the Board issued its decision in *International Longshoremen's Association, AFL-CIO,*

et al. (*Allied International, Inc.*), 257 N.L.R.B. No. 151, holding that the very conduct engaged in by the Union in the present case constituted a violation of Section 8(b)(4)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(4)(B). A copy of the Board's decision and order is appended hereto.

For these reasons as well as those set forth in the government's initial memorandum, the petition in this case should be granted and the case should be set for argument with *Jacksonville Bulk Terminals, Inc.* v. *ILA*, No. 80-1045.

Respectfully submitted.

REX E. LEE
Solicitor General

SEPTEMBER 1981

APPENDIX

257 NLRB No. 151

FJZ
D—8020
Boston, MA

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case 1—CC—1753

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, and LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

and

ALLIED INTERNATIONAL, INC.

DECISION AND ORDER

This case poses the issue of whether the National Labor Relations Board can assert jurisdiction over the allegedly unlawful secondary effects of a primary dispute between an American union and a foreign nation. We conclude that the Board can assert jurisdiction in this case and we do so. We find Respondents [1] have, by their refusal to load or unload cargo destined for or originating in the Union of Soviet Socialist Republics (USSR), engaged in conduct classically subject to and violative of Section 8(b)(4) of the National Labor Relations Act, as amended. The Administrative Law Judge in this case

[1] Respondents are the International Longshoremen's Association, AFL-CIO, and the International Longshoremen's Association, Local 799, AFL-CIO. They are collectively referred to as the International Longshoremen's Association (ILA).

concluded that the Board is deprived of jurisdiction over the alleged violation of Section 8(b)(4).[2] In reaching that conclusion, he engaged in an expansive interpretation of a series of United States Supreme Court cases, while failing to give effect to court of appeals decisions expressly preserved by the Supreme Court. We find his conclusions not necessitated by those Supreme Court cases and inconsistent with our interpretation of our jurisdictional grant under the Act.

We find no fault with the Administrative Law Judge's findings of fact and credibility resolutions,[3] which we adopt. Our disagreement with the Administrative Law Judge lies in his legal analysis of Supreme Court cases and his interpretation of the Board's commerce jurisdiction over activity related to, but not directly involving, foreign nations.

In this case the ILA brought pressure directly to bear on neutral parties in support of a primary

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[2] On March 16, 1981, Administrative Law Judge Bernard Ries issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Charging Party filed exceptions and a supporting brief, and the Respondents filed consolidated exceptions and a brief in support of the exceptions and the Administrative Law Judge's determination.

Pursuant to the provisions of Sec. 3(b) of the Act, the Board has delegated its authority in this proceeding to a three-member panel.

[3] The Respondents have excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

political dispute between it and the government of the USSR. Its actions seriously and adversely affected a variety of American neutral parties. The conduct occurred on American soil and involved American neutral parties. In the Supreme Court's decisions which find implied limitations on the Board's statutory jurisdiction there is nothing to compel the conclusion that Congress intended to deprive the Board of jurisdiction in this case. By contrast, strong policy considerations embedded in the Act weigh heavily in favor of determining the legality of Respondent's conduct in accord with our established standards under the Act.

I.

The essential facts are as follows: On January 9, 1980,[4] 2 weeks after the USSR invaded Afghanistan,[5] Respondent ILA International President Thomas W. Gleason made the following public statement:

> In response to overwhelming demands by the rank and file members of the Union, the leadership of ILA today ordered immediate suspension in handling all Russian ships and all Russian

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[4] All dates are in 1980, unless otherwise indicated.

[5] We take administrative notice that, because of the invasion of Afghanistan by the USSR, President Carter imposed an embargo on exports to the USSR in early January. The President exempted from the embargo the outstanding amount of unshipped grain committed under art. I of the 1975 agreement between the United States and the Soviet Union on the Supply of Grain, 26 U.S.T. 2972; T.I.A.S. No. 8206. The President's statement and directives concerning the embargo issued under the Export Administration Act, 50 U.S.C. App. § 3401, *et seq.*, are contained in the "Weekly Compilation of Presidential Documents," vol. 16, No. 2, Monday, January 14 at pp. 25-27, 32-33.

cargoes in ports from Maine to Texas and Puerto Rico where ILA workers are employed.

This order is effective across the board on all vessels and all cargoes. Grain and other foods as well as high valued general freight. However, any Russian ship now in process of loading or discharging at a waterfront will be worked until completion.

The reason for this action should be apparent in light of international events that have affected relations between the U.S. and Soviet Union.

However, the decision by the Union was made necessary by the demands of the workers.

It is their will to refuse to work Russian vessels and Russian cargoes under present conditions in the world.

People are upset and they refuse to continue the business as usual policy as long as the Russians insist on being international bully boys. It is a decision in which the Union leadership concurs.

The Administrative Law Judge found the boycott decision was instigated, implemented, and enforced by the union leadership despite Respondents' contentions to the contrary. He further found Gleason's statement to be an "order" binding on the rank and file, and that it was so understood by the membership and local union leadership.

The Charging Party, Allied International (Allied), purchases and sells wood products. Allied imports most of its wood from the USSR ($25 million worth in 1979). Allied regularly ships its Russian products

from Leningrad to six American ports, including Boston.

Allied contracts with Waterman Steamship Lines (Waterman), an American corporation, to carry the wood to the United States. Waterman owns three vessels, under United States registry (the *Walton*, the *Middleton*, and the *Jefferson*), which transport the Russian wood. The Boston firm of Peabody & Lane, Inc., is Waterman's ships' agents in the port of Boston. Waterman employs the stevedoring company of John T. Clark & Son (Clark) to unload its ships in Boston. Clark is a member of the Boston Shipping Association. Through the Association, Clark is party to a collective-bargaining agreement with respondents and two other ILA Locals. That agreement contains a union-security clause,[6] and a no-strike clause.[7] Clark obtains its longshoring employees through the union hiring hall as required by the collective-bargaining agreement. The hiring hall maintains 12 permanent gangs to load and unload ships. Each gang has 20 men. The gang members are highly specialized and experienced. Although an incomplete gang may be filled in with some nonunion men (scalawags), a trained, completely nonunion gang could not be hired to unload a vessel. Further, due to their experience on the docks, scalawags refuse to

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[6] Art. 2 of the bargaining agreement provides, in part, "The Employers agree that they will not directly perform any longshoring work done on a pier or terminal, or contract out such work which historically and regularly has been and currently is performed by employees who are members unless the Union is not able or does not supply . . . ."

[7] Art. 40 provides, in part, "[T]he Union agrees that there shall be no strike or work stoppages by the employees."

work ships when the ILA engages in a work stoppage of any kind.

After ILA President Gleason's announcement of the boycott, Allied contacted ILA representatives several times to determine if the ILA would unload Allied's wood in the port of Boston. Each time the Union informed Allied that its position was unchanged and the boycott was firm. When the *Walton* arrived in Boston on January 9 with a cargo of Russian wood, Allied's president, Edward Gildea, and treasurer, Morton Waldfogel, telephoned Gleason to ask him to permit the *Walton* to unload in Boston and its other destined ports. Gleason replied that "he had to draw a line some place" and thus the ILA would unload the *Walton* in Boston, but not at any other American port. After this conversation, Waterman canceled the remainder of the *Walton's* itinerary and discharged its entire cargo in Boston. Due to the boycott, Allied and Waterman diverted the *Middleton* to Montreal to unload its cargo in late January, and directed the *Jefferson* to leave Leningrad without any freight. Finally, as a consequence of the boycott, Allied renegotiated its contract with Russia so as to reduce wood purchases by about $16 million (well over half of its 1979 purchases).

On March 12, after a Federal court enjoined the ILA from boycotting the ports of Savannah and Brunswick, Gildea asked whether the ILA position had changed. Edward Connolly, business agent for Respondent Local 799, replied that any change would be transmitted to him from ILA International Vice President Hankard who would check with ILA President Gleason. On March 25, Allied Vice President Kaires met with Hankard who told Kaires the Union's position had not changed but he would discuss the possibilities of handling Russian cargo in the port

of Boston with Gleason, and "the local stevedores do what they are told to do."

At the time of the hearing in this case the ILA continued to maintain its boycott and Allied remained unable to transport Russian wood directly to the United States.

II.

The Administrative Law Judge dismissed the complaint for want of jurisdiction. He relied on a series of Supreme Court cases[8] which have defined the statutory term "commerce" so as to limit the Board's jurisdiction in situations where the disputed conduct involved and inescapably interfered with the maritime operations of foreign vessels. He therefore found it unnecessary to address the lawfulness of the conduct. This reading of Supreme Court precedent is unduly expansive. We interpret the Supreme Court's decisions as construing "in commerce" to exclude certain activity involving foreign entities. The Court has never barred or indicated its intention to bar jurisdiction over activity between exclusively American entities simply because that activity has some relation to foreign maritime operations. Indeed, such a bar would contradict the clear language of the Act.

The Board is the initial interpreter of the language contained in the NLRA and the Supreme Court has

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[8] *Benz* v. *Compania Naviero Hidalgo, S.A.*, 353 U.S. 138 (1957); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Incres Steam Ship Co.* v. *International Maritime Workers Union*, 372 U.S. 24 (1963); *International Longshoremen's Local 1416, AFL-CIO* v. *Ariadne Shipping Ltd., et al.*, 397 U.S. 195 (1970); *Windward Shipping (London) Limited, et al.* v. *American Radio Association, AFL-CIO, et al.*, 415 U.S. 104 (1974); and *American Radio Association, AFL-CIO, et al.* v. *Mobile Steamship Association, Inc.*, 419 U.S. 215 (1974).

accorded deference on that basis to the Board's interpretation, *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944). In the absence of a clear jurisdictional bar, from the Supreme Court, it would constitute an abdication of our interpretive responsibility to limit our jurisdiction on the basis of the expansive reading of the Court's decisions undertaken by the Administrative Law Judge here.

This is particularly the case when the result would contravene the fundamental congressional intent to formulate a uniform national labor policy not subject to varying and inconsistent state-by-state adjudications. The need for a uniform national policy concerning the ILA's conduct, and conduct similar to it, is unusually compelling. The ILA's actions triggered a national boycott potentially affecting every port in the United States. The ILA can affect the USSR's stance on Afghanistan, if at all, only through an effective nationwide boycott of Russian cargo. A failure to assert jurisdiction would force charging parties into the various state courts, all of which have different injunctive statutes with different standards.[9] Resort to the state courts may well lead to contradictory results, with the ILA being enjoined in some ports and not in others.

Moreover, the peculiar facts here demonstrate the necessity of Federal jurisdiction. The invasion of

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[9] See, e.g., Revised Tex. Stat. Ann., Art. 5154f construed in *Alamo Exp.* v. *International Brotherhood of Teamsters, Local Union No. 657*, 215 S.W.2d 936 (Tex. Civ. App. 1949); Ga. Code Ann., 354-804, 55-108, construed in *Brown Transport, et al.* v. *Truck Drivers and Helpers Local Union No. 728*, 129 S.E. 2d 767 (Ga. Sup. Ct. 1963); N.J. Stat. Ann., § 2A: 15-51, 52, and 53, construed in *Hammer* v. *Local 211, United Textile Workers*, 111 A.2d 308 (N.J. Sup. Ct. 1954).

Afghanistan prompted President Carter to impose an embargo on exports to the USSR in early January.[10] The President exempted certain goods from the embargo in an attempt to establish a uniform national response. Yet, just as the President established limited sanctions against the Soviet Union, the ILA announced its own boycott. Thus, this case presents the novel situation of a labor union establishing a national boycott contravening a Federal policy. The National Labor Relations Board, empowered to enforce the uniform Federal policy embodied in the National Labor Relations Act, which specifically regulates the type of conduct at issue here, is the only forum well suited to deal with this conflict.[11]

Section 10(a) of the Act empowers the Board to prevent "any person from engaging in any *unfair labor practice* (listed in Section 8) *affecting commerce.*" The term "commerce" is defined to include "trade, traffic, commerce, transportation, or communication . . . between any foreign country and any State." [12] Thus, the Act clearly grants jurisdiction over unfair labor practices affecting foreign commerce. The legislative history states unequivocally that "the bill is based squarely on the power of [Congress to regulate] commerce among the several States

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[10] See fn. 5, *supra.*

[11] I Leg. Hist. 1427 (NLRA, 1947) states:

> Only by the operation of a single unifying and coordinating administrative body can the law of Congress be kept true to its intent and receive respectful attention in the courts.

[12] National Labor Relations Act, as amended (61 Stat. 136; 79 Stat. 5196, 88 Stat. 395, 29 U.S.C. § 151, *et seq.*), Sec. 2(6).

and with foreign nations," but does not define commerce jurisdiction with foreign nations.[13]

Although the activity involved here would seem, at first blush, clearly within our jurisdiction, the Supreme Court noted, in *Windward Shipping, Ltd., supra*, that the term "in commerce" is not self-defining. In *Windward*, and several other cases, the Court has identified certain limitations on our jurisdiction over activity that involves foreign maritime operations. The Administrative Law Judge found that this case falls within those limitations and therefore is beyond our jurisdiction. We disagree.

In finding our assertion of jurisdiction appropriate here, we note first that the ILA boycott is quite arguably an example of classic economic pressure on neutral parties prohibited by Section 8(b)(4) of the Act. That the ILA's conduct was directed solely against exclusively neutral and American entities sets it apart from the activities involved in the Supreme Court cases limiting our jurisdiction.

Reduced to its simplest form, this case presents a dispute between the ILA and the USSR. Respondents concede, and no party contests, a primary objective to pressure the Soviet government to halt its aggression against Afghanistan. Beyond cavil, that dispute is not subject to regulation by the Act or any of the Nation's labor laws. That, however, does not end our inquiry.

Although Section 8(b)(4) is commonly described as prohibiting secondary boycotts,[14] its prohibitions

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[13] [II] Leg. Hist. 3057 (NLRA, 1935).

[14] Sec. 8(b)(4)(i) and (ii)(B) states, in relevant part, as follows:

> 8(b) It shall be an unfair labor practice for a labor organization or its agents—
>
> * * * * *

do not encompass a primary-secondary dichotomy. Rather, Section 8(b)(4) prohibits certain specified conduct if engaged in with certain specified objectives. The absence of a primary labor dispute does not preclude the invocation of Section 8(b)(4)'s protections.

The Supreme Court made clear in *National Woodwork Manufacturers Association* v. *N.L.R.B.*, 386 U.S. 612, 644-645 (1967), that if a "boycott were tactically calculated to satisfy union objectives elsewhere [it is secondary, and] there need not be an actual dispute with the boycotted employer . . . for the [dispute] to fall within this category." This principle has been applied by the courts and the Board in a variety of situations where, as here, the union has no primary labor dispute with any employer. For example, in *N.L.R.B.* v. *Washington-Oregon Shingle*

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(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:

* * * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing . . . .

Weavers' District Council and Everett Local 2580 Shingle Weavers' Union, AFL [*Sound Shingle Co.*], 211 F.2d 149 (9th Cir. 1954), a union ordered employees of an employer not to process shingles into shakes because it had been attempting to organize the Canadian mills that manufacture such shingles. The union admittedly had no dispute with the specific Canadian mill that was processing these shingles. The court stated:

> The Union's argument that there was no evidence of a dispute between it and the Canadian plants is without merit. If that were true, it would not make the Union's conduct any more excusable. The prohibited object of the boycott is stated by the statute to be "forcing . . . any employer or other person to cease using . . . the products of any other producer, processor, or manufacturer . . . ." That is a prohibited object whether the union has or has not a dispute with such "other producer, processor, or manufacturer." *In fact, if the object is sought, not because of any dispute, but merely because the union dislikes the other producer for any reason, or for no reason, the conduct would appear even more reprehensible* . . . . [*Id.* at 152.] [Emphasis supplied.]

Several courts have concurred in the analysis applied in *Shingle Weavers'*.[16] The circuit court decisions rest

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[16] *Soft Drink Workers Union Local 812, IBT* v. *N.L.R.B.*, 105 LRRM 2658, 90 LC ¶ 12,412 (D.C. Cir. 1980); *N.L.R.B.* v. *Twin City Carpenters District Council* [*Pentom, Inc.*], 422 F.2d 309 (8th Cir. 1970); *National Maritime Union of America* v. *N.L.R.B.*, 342 F.2d 538 (2d Cir. 1965), cert. denied 382 U.S. 835; *National Maritime Union of America*,

on a rationale derived directly from the legislative history of the Act that the secondary boycott provision serves dual congressional objectives which may be considered as mutually exclusive: "preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of *shielding unoffending* employers and others from pressures in controversies not their own." [16] (Emphasis supplied.)

It is plain from the legislative history that the secondary boycott provisions are to be construed broadly. The House Report stated that one of the characteristics of secondary activities is:

> [T]hat they do not arise out of any dispute between an employer and employees who engage in the activities, or, in most cases, between the employer and any of his employees. More often than not, the employers are powerless to comply with the demands giving rise to the activities, and many times they and their employees do as well are the helpless victims of quarrels that do not concern them at all . . . .[17]

In the same vein Senator Taft stated that the object of Section 8(b)(4) of the Act is to protect "a third

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AFL-CIO v. *N.L.R.B.*, 346 F.2d 411 (D.C. Cir. 1965), cert. denied 382 U.S. 840.

Of the five circuit courts that have considered the issue, only the Fourth Circuit found a primary dispute necessary to the finding of a violation of Sec. 8(b)(4) of the Act. *N.L.R.B.* v. *International Longshoremen's Association and Local 1355, ILA* [*Ocean Shipping Service*], 332 F.2d 992 (4th Cir. 1964).

[16] *N.L.R.B.* v. *Denver Building and Construction Trades Council* [*Gould & Preisner*], 341 U.S. 675, 692 (1951).

[17] II Leg. Hist. (NLRA, 1947).

person who is wholly unconcerned in the disagreement . . . ." [18]

Congress invested the Board with exclusive jurisdiction to determine the legality of such conduct in order to foster a uniform Federal policy in labor relations.[19]

It is difficult to imagine a situation that falls more squarely within the scope of Section 8(b)(4) than the one before us today. Here, the Union's sole dispute is with the USSR over its invasion of Afghanistan. Allied, Waterman, and Clark [20] have nothing to do with this dispute. Yet the Union's actions in furtherance of its disagreement with Soviet foreign policy have brought direct economic pressure on all three parties and have resulted in a substantial cessation of business. Thus, the conduct alleged in this case is precisely the type of conduct Congress intended the National Labor Relations Act to regulate.[21]

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[18] *Id.* at 1106.

[19] I Leg. Hist. 314 (NLRA, 1947).

[20] Pursuant to Sec. 8(b)(4)(i) and (ii)(B), we would find the neutral Employers herein, Allied, Waterman, and Clark, to be "persons" under the Act.

[21] In *Allied International, Inc.* v. *International Longshoremen's Association, AFL-CIO*, 640 F.2d 1368, 1378 (1st Cir. 1980), the court writes:

> The labor laws do not confer upon bargaining representatives a voice in the conduct of [foreign policy. The fact that there has been] few, if any, cases that have applied the secondary boycott provisions to activity motivated by a "purely political dispute" illustrates little more than the rarity with which labor unions have seen fit to engage in this sort of "political strike" conduct. The language of section 8(b)(4) and the congressional objectives that prompted its enactments point to no reason why the section should not prohibit any secondary pressure, for whatever reasons motivated.

Nevertheless, as noted above, the Supreme Court, in a series of decisions broadly applied by the Administrative Law Judge and our dissenting colleague, has created implied limitations on our jurisdiction over activity involving foreign entities. The net effect of this expansive reading of the Court's limitations would be to nullify the jurisdiction of the NLRB in all cases involving a foreign entity. We conclude that the Supreme Court has not so emasculated our jurisdiction, and that assertion of jurisdiction here is fully consistent with the Court's decisions. Further, as noted above, considerations of national policy weigh heavily in favor of assertion of jurisdiction. Under such circumstances, we will not deprive injured, neutral parties of the protection of the Act without the clearest mandate to do so.

The Supreme Court has held that the Board is deprived of jurisdiction over a primary labor dispute between an American union and a foreign entity on the grounds that such assertion of jurisdiction would inescapably interfere with foreign labor relations, foreign trade, and comity among nations. It has also held, for the same reasons, that the Board is deprived of jurisdiction over the secondary effects resulting from primary conduct engaged in by an American union in furtherance of a primary dispute with a foreign entity. The Court has never held, however, that we are necessarily deprived of jurisdiction over *all* secondary conduct engaged in to further a primary dispute which itself is beyond our jurisdiction merely because that dispute is with a foreign entity.

Indeed, the Court expressly has approved our assertion of jurisdiction through Section 8(b)(4) over domestic secondary activity undertaken in furtherance of a primary dispute with a foreign primary

employer. This case involves just such domestic secondary conduct directed at U.S. employers in an attempt to bring pressure on a foreign primary disputant. It is therefore squarely within the jurisdictional parameters set out by the Supreme Court. An analysis of the relevant precedents fully supports this conclusion and demonstrates that the applicable Supreme Court cases are in harmony.

The line of six Supreme Court cases relied on by the Administrative Law Judge stretches back to 1957. The first three of those cases involved claims of Board jurisdiction over primary labor disputes between foreign flag carriers and foreign seamen employed by those carriers.[22] Thus *Benz* involved picketing by an American union to support striking foreign crews employed under foreign articles; *McCulloch* concerned a Board ordered election involving foreign crews of foreign flag ships; and *Incres* involved the picketing of a foreign ship by an American Union in an effort to organize the foreign crew. The Court's expressed concern in those cases focused on Board jurisdiction resulting in interference with foreign maritime operations. Although the Court found no specific congressional prohibition of Board jurisdiction in those cases, it held that the assertion of jurisdiction would directly interfere with the laws governing foreign flag carriers and, in so doing, contravene the principles of comity and international trade. The Court stated:

> For us to run interference in such a delicate field of international relations there must be present

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[22] *Benz* v. *Compania Naviero Hidalgo, S.A.*, 353 U.S. 138 (1957); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963); *Incres Steam Ship Co.* v. *International Maritime Workers Union*, 372 U.S. 24 (1963).

> the affirmative intention of Congress clearly expressed. [353 U.S. at 147.]

Finding no expression of "affirmative intention" by Congress, the Court denied Board jurisdiction, noting that none of the cases dealt with "industrial strife between American employees and employers" that Congress intended the Act to protect against.

The Court reached a different result, however, when it considered a dispute over the wages paid to American employees by the owners of foreign flag ships. It found that an American union's picketing of a foreign flag vessel protesting substandard wages for longshoring work as an activity "in commerce." *International Longshoremen's Association, Local 1416, AFL-CIO* v. *Ariadne Shipping Co., Ltd.*, 397 U.S. 195 (1970). Although *Ariadne* involved a primary labor dispute with a foreign-flag vessel, the Court noted that the dispute "centered on the wages to be paid American residents, who were employed . . . not to serve as members of its crew but rather to do casual longshore work." *Id.* at 199. It therefore held that assertion of the Board's jurisdiction would not threaten interference in the internal affairs of foreign ships so as to conflict with foreign or international law.[23]

In each case, from *Benz* to *Ariadne*, the Court faced activity directed against foreign interests. In each instance, the critical factor determining the assertion of jurisdiction was the degree of interference in the internal affairs of foreign entities and/or the potential conflict with principles of comity in international maritime trade. Each of these cases involved a

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[23] The Court reached this conclusion despite the fact that the longshoring work was done both by American longshoremen and foreign seamen.

question of Board jurisdiction over primary labor activity undertaken against a foreign carrier and raised no question concerning injury to American neutrals.

Windward Shipping (London) Limited, et al. v. *American Radio Association, AFL-CIO, et al.*, 415 U.S. 104 (1974), like the earlier cases, presented only a question of jurisdiction over primary activity directed against foreign labor relations. There, an American union picketed foreign ships protesting substandard wages paid to their foreign crews. The union's area standards picketing publicized the competitive advantage enjoyed by foreign ships because of the difference between foreign and domestic seamens' wages. The Court noted that the picketing did not involve "the inescapable intrusion into the affairs of foreign ships" that was present in *Benz* and *Incres*, in that there was no attempt to organize foreign crews or to support foreign crews in their own wage dispute with a foreign shipowner. Nevertheless, the Court held that the conduct was controlled by the *Benz* line of cases rather than by *Ariadne*. In so holding, the Court observed that the union must have hoped to force the foreign shipowners to raise their operating costs and that such an increase would have a significant impact on the maritime operations of the ship well beyond wages paid in American ports. The Court stated:

> Virtually none of the predictable responses of a foreign shipowner to picketing of this type, therefore, would be limited to the sort of wage-cost decision benefitting American working men which the LMRA was designed to regulate. [415 U.S. at 115.]

The secondary effects of the very conduct at issue in *Windward* came before the Court in *Mobile*.[24] There, American stevedoring companies seeking to service the picketed foreign ships and American shippers wishing to load their cargos on the ships sought to enjoin the identical picketing. These parties argued that *Windward* held only that the maritime operation of foreign ships were not "in commerce." They contended that a different result was required when the picketing was viewed in the context of its effect on American employers, who were themselves clearly "in commerce." The Court rejected this argument because it required a "bifurcated view of the effects of a single group of pickets at a single site." The Court found that the response of the American stevedores was a:

> . . . crucial part of the mechanism by which the maritime operations of the foreign ships were to be affected. . . . *The effect of the picketing on the operations of the stevedores and shippers . . . is precisely the same whether it be complained of by the foreign-ship owners or by persons seeking to service and deal with the ships.* The fact that the jurisdiction of the state courts in this case is invoked by stevedores and shippers does not convert into "commerce" activities which plainly were not such in *Windward.* [*Emphasis supplied.*][25]

Thus, the finding that *Mobile* picketing was not "in commerce" rested upon the *primary* nature of the activity; i.e. the attempt to directly pressure foreign shipowners to raise the wages of their seamen

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[24] 419 U.S. 215 (1974).

[25] *Mobile*, 419 U.S. at 224-225.

to the level of domestic wages, and the necessary effect of this primary activity on foreign maritime operations.[26] In so holding, the Court noted that it need cast no doubt on those cases finding that the Board has jurisdiction under Section 8(b)(4) of *domestic* secondary activities which *are* "in commerce" even though the primary employer and the locus of the primary dispute is outside the United States.[27] In effect, the combined *Windward* and *Mobile* holdings are that primary conduct which interferes with foreign maritime operations is not subject to the Board's jurisdiction, regardless of whether the charging party is a primary or secondary employer.

The Administrative Law Judge ignored the critical fact that the Court analyzed the secondary effect of the *Mobile* picketing solely on the basis of its identity with the primary conduct held to be beyond the Board's jurisdiction in *Windward*. Instead, he found that *Windward* represented a departure from the *Benz* mode of analysis. He felt the Court now would utilize two tests to determine whether Board jurisdiction would intrude into international maritime relations: the objective of the Union and the predictable

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[26] In both *Windward* and *Mobile* plaintiffs sought to enjoin primary conduct which, had Board jurisdiction been asserted, might well have been immunized from the prohibitions of Sec. 8(b)(4) by the primary conduct proviso to that section.

[27] The court specifically approved of the holdings in *Grain Elevator, Flour and Feed Mill Workers, ILA, Local 418 AFL-CIO* [*Continental Grain Company*] v. *N.L.R.B.*, 376 F.2d 774 (D.C. Cir. 1967); and *Madden* v. *Grain Elevator, Flour and Feed Mill Workers, ILA, Local 418 AFL-CIO* [*Continental Grain Company*], 334 F.2d 1014 (7th Cir. 1964). Those cases recognize the Board jurisdiction over domestic secondary activity undertaken in furtherance of a primary labor dispute involving foreign employees of a foreign employer.

impact of its conduct. The tests would operate "to remove from Board jurisdiction the regulation of conduct which promised a substantial adverse economic effect upon foreign trade." (ALJD, p. 17, ll. 13-16.) The Administrative Law Judge also viewed *Mobile* as focusing on the economic impact on foreign trade rather than the relationship between primary and secondary activity. He relied on the following:

> Here, neither the farmer seeking to ship his soybeans, the stevedores who contracted to unload the cargo of the foreign-flag vessel, nor the longshoremen whom the stevedores employed to carry out this undertaking, were for these purposes engaged in or affecting commerce within the purview of the National Labor Relations Act. Therefore the petitioner's picketing did not even "arguably" violate § 8(b)(4)(B) of that Act. [*Mobile*, 419 U.S. at 228.]

From this perspective, the Administrative Law Judge found the ILA's conduct "threatened the sort of ramifying consequences, affecting the Russian economy, without countervailing and limited benefit to domestic workers, to which *Windward* referred." (ALJD, p. 36, ll. 31-36).[28]

This is clearly a misreading of *Windward* and *Mobile*. In *Mobile*, the Court stressed the inextricable intertwining of the primary and secondary effects of the same primary conduct. It found the same interference with foreign maritime operations in both instances. Thus, in *Mobile* the Court found the Board could not assert jurisdiction over primary con-

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[28] The language used and the analysis engaged in by the Administrative Law Judge closely tracks that of the Fifth Circuit in *Baldovin* v. *International Longshoremen's Association*, 626 F.2d 445 (1980), discussed *infra*.

duct (terms and conditions of foreign seamen on foreign vessels) that was not "in commerce," regardless of who sought jurisdiction.

The Administrative Law Judge's reading of *Mobile*[29] is inconsistent with his inability to explain the Court's approval of the *Grain Workers* cases.[30] However, a correct understanding of *Mobile* demonstrates its harmony with those cases.

The *Grain Workers* cases arose from a primary dispute between a Canadian union and a Canadian shipping company concerning working conditions of Canadian employees. This primary dispute was inarguably beyond the Board's jurisdiction. However, when the foreign union's domestic affiliate sought to support that dispute by a work stoppage "directed against an American employer . . . and involving employees working in a domestic plant of the American employer," that *secondary* conduct was subject to the Board's jurisdiction. (*Grain Elevator*, 334 F.2d at 1019.) Because of the purely secondary and domestic nature of the conduct, application of the NLRA did not result in an attempt to regulate the internal management of affairs of the Canadian ships.

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[29] In the same manner, the Administrative Law Judge has misinterpreted our decision in *National Maritime Union of America (Shippers Stevedoring Company)*, 245 NLRB 149 (1979). There, the picketing activity was directed immediately against the foreign flag ship with the intent of compelling the total replacement of the foreign ship and its foreign crew with an American ship and its American crew. This case falls squarely into the Court's limitation in *Windward/Mobile*: the dispute *directly* intruded into the maritime operations of a foreign ship.

[30] See fn. 27, *supra*.

The present ILA case is distinguished from *Windward* and *Mobile* on exactly the same basis. The alleged conduct is purely secondary and there is no risk that assertion of Board jurisdiction will directly intrude into the maritime operations of a foreign ship. The only interpretation that should be given to the Court's decisions in *Windward* and *Mobile* is that clearly indicated by them. Those cases hold only that, where primary activity interferes with foreign maritime relations and inextricably involves the secondary employers, the Board is prohibited from asserting jurisdiction over the primary conduct or its secondary effects. There is thus no bar to our assertion of jurisdiction.

This interpretation of the Supreme Court's teaching is consistent with the result reached by the First Circuit in *Allied International, Inc., supra*, 640 F.2d 1368 (1981). *Allied* presented the same facts under consideration here. The court pointed out that it did not face the situation the Supreme Court addressed in *Windward* and *Mobile* where American unions or employers were only peripherally involved in the dispute. To the contrary, the dispute at issue was solely American. It stated: "[t]he *only* labor-related activity in issue has been played out by an all-American cast." (640 F.2d at 1374)." It also stated:

> Allied, Waterman and Clark are American companies and the ILA is an American union. All engage regularly in business affecting the transportation of goods among the several states. Indeed, the instant dispute arose when the ILA's actions allegedly impeded Allied's ability to move its wood products from Boston to other ports along the East Coast, and Allied contends that

> the ILA continues to frustrate its ability to transport its goods into this country. [640 F.2d at 1371.]

The *Allied* court went on to conclude "[t]he fact that this domestic labor dispute was inspired by military events in foreign lands—events far beyond NLRB jurisdiction—does not counsel against application for the NLRA to the labor dispute ongoing here at home. In sum, none of the considerations that prompted the Court in cases such as *Windward, Incres,* and *Benz* to find the Act inapplicable have force in this context. We hold, therefore, that section 8(b)(4) applies . . . ." [640 F.2d at 1374.]

The court addressed the distinction between this case and *Windward/Mobile.* Here, purely American secondary employers are objecting to purely secondary conduct subject to Section 8(b)(4), whereas in *Mobile* secondary employers were objecting to primary activity not subject to our jurisdiction. In fact as the court notes, contrary to *Mobile,* the primary dispute is "far beyond NLRB jurisdiction."

Contrary to the finding of the Administrative Law Judge, the Board's assertion of jurisdiction in *Local 1355, International Longshoremen's Association (Ocean Shipping Service, Ltd.),* 146 NLRB 723 (1962), is also in harmony with the Supreme Court's rulings in *Windward* and *Mobile.*[31] That case in-

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[31] The Administrative Law Judge found the Board's decision in *Ocean Shipping* not binding on him:

> The same staleness consideration applies to the Board's assertion of jurisdiction in one of the *Grain Workers* cases, decided in 1965. [ALJD at fn 25.]

The Administrative Law Judge neglected to note that *Grain Workers* was upheld by the circuit court and was the basis for fn. 10 in *Mobile.*

volved another ILA boycott, undertaken during the 1962 Cuban missile crisis. The ILA refused to load ships engaged in Cuban trade. As here, there was neither picketing nor any other interference with ship operations. The Board found the ILA's domestic secondary conduct was subject to its jurisdiction and violative of Section 8(b)(4).

The Administrative Law Judge and, inferentially, our dissenting colleague have rejected this analysis of *Allied* and *Ocean Shipping*, choosing instead to embrace the contrary reasoning of the Fifth Circuit in *Baldovin* v. *International Longshoremen's Association, AFL-CIO*, 626 F.2d 445 (1980). That case arose from the same ILA boycott involved here and presented a like fact pattern. The Fifth Circuit found that the Supreme Court's decision in *Mobile* deprived us of jurisdiction. The court wrote:

> [T]he secondary boycott prohibition was designed to narrow the labor controversy into a confrontation between the primary opponents . . . if the objective of the union is to obtain concessions of a kind that could not be achieved either by domestic action or by labor disputes of the kind encompassed by the NLRA, the boycott ban would be merely a prohibition devoid of its functions. [*Id.* 626 F.2d at 450.]

On this basis the court held (at 452):

> While the ILA refusal to work has affected American farmers who produce the grain, American transportation companies who move it to ports and the American stevedores who load it aboard vessels, it is patent that this was an incidental effect and not the objective. As the *Mobile* case holds, a bifurcated view of such "commerce" is not permitted as regards the

> American farmers and stevedores who are incidentally affected by the ILA's politically-inspired work stoppage. The effect of the ILA action on the business of these American entities provides no "basis for Board *statutory* authority . . . . [419 U.S. at 226]" [Emphasis supplied.]

We disagree with this rationale in at least three respects.

First, the court's language that the prohibition on secondary boycotts "was designed to narrow the labor controversy into a confrontation between primary opponents" is contrary to the language of Section 8(b)(4) and the overwhelming weight of existing precedent. As discussed above, the absence of a primary dispute does not preclude the invocation of 8(b)(4) protections. As we have previously noted, the Supreme Court has stated that "[t]here need not be an actual dispute with the boycotted employer" for there to be a boycott which is secondary in its aim and therefore prohibited.[32]

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[32] *National Woodwork Mfgrs. Assn.*, 386 U.S. at 645, see discussion at p. 6-8, *supra*. Moreover, in a tandem decision to *Baldovin*, *New Orleans Steamship Association* v. *General Longshore Workers, ILA Local Union No. 1418* [*Jacksonville Bulk Terminals*], 626 F.2d 455 (5th Cir. 1980), the court held that the ILA boycott which is a strike to further the political goals of the union does "involve or grow out of any labor dispute" for purpose of the Norris-LaGuardia Act. Because the definition of "labor dispute" is the same under the National Labor Relations Act and Norris-LaGuardia Act, the court, in attempting to harmonize *Baldovin* and *Jacksonville Bulk*, stated at fn. 9 in *Jacksonville Bulk* that, although this is a labor dispute, it is not "in commerce" for the purpose of Sec. 8(b)(4) of the Act. Yet, in *Baldovin*, as discussed *supra*, the court went to great lengths to explain the boycott was not "in commerce" precisely because there is no primary labor dispute.

Second, the *Baldovin* court interprets the Supreme Court's decision in *Mobile* in a manner which conflicts with the *National Woodwork* decision. As noted above, *Mobile* holds that primary conduct not subject to the Board's jurisdiction, and therefore not subject to being enjoined at the behest of the primary employer, is not made subject to that jurisdiction by virtue of its secondary effects. Unlike the *Baldovin* court, however, we do not interpret *Mobile* to hold that the purely secondary conduct in this case is not subject to the Board's jurisdiction.

Finally, the Fifth Circuit stated that the impact of the respondent's activities on the American neutrals is "an incidental effect and not the objective." As discussed *infra*, the Supreme Court's precedents make clear that the necessary and foreseeable consequences of a union's activity are every bit as much its object within the meaning of Section 8(b)(4) as are its stated objectives.[33]

The ILA has engaged in conduct classically subject to regulation under Section 8(b)(4). This conduct involved actions by American employees working for American employers and caused serious injury to neutral parties. Assertion of jurisdiction over this purely domestic secondary conduct does not involve us in regulation of the primary dispute between the ILA and the USSR; it poses no interference with foreign maritime operations; it furthers the legislative purpose in enacting Section 8(b)(4); and it is consistent with the Supreme Court's teachings. Therefore, we determine the legality of the ILA's boycott under the Act.

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[33] See discussion *infra* at pp. 30-34.

III.

Section 8(b)(4) shields "unoffending employers and others from pressures in controversies not their own." [34] It bars a union from either inducing employees to refuse to handle goods or from threatening or coercing any person with an object of forcing any person to cease doing business with a third person. The ILA boycott of Russian cargo is a classic example of the inducement and coercion forbidden by Section 8(b)(4). Respondents concede their sole dispute is with the USSR over its military policy in Afghanistan.[35] Allied, Waterman, and Clark clearly have no part in this controversy. Beyond question, they are neutral employers. Yet it is undisputed that Respondents' refusal to handle Russian cargo has caused substantial disruption of their business operations resulting in significant economic harm to them. Respondents' admissions alone therefore suggest their conduct is within the scope of Section 8(b)(4)(i) and (ii)(B). Examination of their defenses compels the finding of a violation.

First, Respondents assert that they did not induce their members to boycott Russian goods. Instead, they argue that ILA President Gleason's January 9 public statement ordering the immediate suspension in handling all Russian ships and cargo was merely a "response to overwhelming demands by the rank and file and was responsive to their urgings for a uniform policy." The facts in this case are over-

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[34] *N.L.R.B.* v. *Denver Building and Construction Trades Council*, 341 U.S. 675, 692 (1951).

[35] As seen in sec. II, *supra*, the absence of a primary labor dispute cognizable under the Act does not preclude the application of Sec. 8(b)(4) to the events in question in this case.

whelmingly to the contrary, and establish conclusively that Gleason's January 9 statement was a binding order from the president of the ILA to the rank-and-file membership.[36] The Administrative Law Judge so found, and we agree.

The orchestration of the boycott by the International's leadership is evident in conversations between Allied officials and representatives of the Local Unions, discussed in section I,[37] which indicated that any change in the boycott of Russian cargo would originate with ILA President Gleason.

Further, on the morning of January 9, prior to the public release of Gleason's statement, ILA longshoremen employed by Clark to unload the Waterman ship, *Walton*, discovered that Allied's wood cargo had originated in the USSR. They were "very disturbed" about handling that cargo, and *wanted* to leave the *Walton* immediately. Notwithstanding these express wishes of the rank and file to stop working on cargo from the USSR, Hankard told the longshoremen to continue working until he found out from ILA headquarters in New York "what was happening." None of the ILA rank and file in Boston actually stopped handling Russian cargo until ordered to do so by Gleason.

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[36] Thus, Respondents characterize the reading of Gleason's January 9 statement at hiring hall shapeups as the statement being "put to the membership," which was "enthusiastic," "extremely happy," and "in full accord with the position taken in the statement." However, ILA Vice President William Hankard testified that none of the locals even had a *vote* on the question of the Russian boycott. Hankard further testified that the matter of the Russian boycott had never even been brought up for discussion at his own local, of which he is president.

[37] See p. 3, *supra*.

This uncontroverted evidence demonstrates that the decision to boycott Russian cargo was made by ILA leadership and was maintained in effect as a matter of ILA policy determined at the headquarters level. Accordingly, we conclude that Respondents engaged in, and induced and encouraged ILA members employed by Clark to engage in, a refusal in the course of their employment in Boston to handle Allied's wood products emanating from the USSR.

Second, Respondents argue that their only object in refusing to handle Russian cargo was to demonstrate their disapproval of Soviet foreign policy and their unwillingness to contribute in any way to the Soviet cause. They maintain that any cessation in the handling of Russian cargo, or in the purchase or shipment of Russian goods by the business entities here involved was not "an object," but, rather, the unintended effect of withholding their services in demonstration of their disapproval of the invasion of Afghanistan.[38] This argument is wholly without merit. Regardless of whether Respondents *intention-*

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[38] Respondents assert the additional defense that this demonstration of their disapproval of Soviet aggression is protected by the first amendment as an expression of individual conscience. This contention is easily defeated. The ILA boycott is not merely the expression of conscience by individuals. As discussed above, it is a concerted action which predictably encouraged others to cease doing business with neutral, secondary persons. The application of Sec. 8(b)(4) to such conduct imposes no impermissible restrictions upon constitutionally protected speech. *N.L.R.B.* v. *Retail Store Employees Union, Local 1001, Retail Clerks International Association, AFL-CIO* [*Safeco Title Insurance Co.*], 447 U.S. 607, 616 (1980), discussed further, *infra*. See also *Allied International, Inc.* v. *International Longshoremen's Association, AFL-CIO, et al.*, 640 F.2d 1368 (1st Cir. 1981).

ally calculated a total cessation in the handling of Russian cargo at east coast and gulf ports, with an attendant cessation of business among the commercial entities in this case, such an outcome was the foreseeable and inevitable consequence of their actions, and, as such, constitutes an unlawful object.

The Supreme Court has long recognized the difficulty of assessing the object of conduct under Section 8(b)(4), noting that the Board and the Courts have "attempted to devise reasonable criteria drawing heavily upon the means to which a union resorts in promoting its cause." [39] Accordingly, the Court has held that a respondent's intent or purpose may be shown by the nature of its conduct.[40] The Court recently applied this mode of analysis in *N.L.R.B.* v. *Retail Store Employees Union, Local 1001* [*Safeco Title Insurance Co.*], *supra*. There, contract negotiations between Safeco and the union representing some of its employees reached an impasse and the employees went on strike. The union picketed not only at Safeco's offices but also at five local county title insurance companies which derived over 90 percent of their respective gross incomes from the sale of Safeco's insurance. The pickets carried signs declaring that Safeco had no contract with the union, and distributed handbills asking customers to support the strike by canceling their Safeco policies. This conduct was alleged to violate Section 8(b)(4).

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[39] *Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO* [*General Electric Company*] v. *N.L.R.B.*, 366 U.S. 667, 674 (1961).

[40] *Id.*, referring to *Seafarers International Union of North America, Atlantic & Gulf District, Harbor and Inland Waterways Division* [*Salt Water Dome Production Co.*] v. *N.L.R.B.*, 265 F.2d 585, 591 (D.C. Cir. 1959).

Quoting the Board's Safeco decision,[41] the Court stated: "[T]he Union's secondary appeal against the central product sold by the title companies in this case is 'reasonably calculated to induce customers not to patronize the neutrals at all.' " [42] The Court found that the union was responsible for the foreseeable consequences of its conduct and held that product picketing that reasonably can be expected to threaten neutral parties with ruin or substantial loss is contrary to the language and purpose of Section 8(b)(4)(ii)(B) of the Act.

The holding of *Safeco* applies with full force to this case. Approximately 85 percent of Allied's imported products, amounting to $25 million annually, come from the USSR. The boycott of Russian cargo inevitably could be expected to threaten Allied with substantial economic loss.

It was equally foreseeable that no longshoremen could be employed by the neutral parties in the face of the ILA boycott. Clark regularly depends on the hiring halls operated by the ILA Locals to furnish the longshoremen who constitute its regular work force. Indeed, the relevant collective-bargaining agreements obligate the stevedoring companies to rely on these hiring halls for *all* of their longshore employees, and permit the companies to seek labor from other sources only if the ILA cannot supply the labor or does not want to work the ship.

While the collective-bargaining agreements may have permitted the use of non-ILA employees, it was entirely predictable that such employees would not be available during the ILA boycott. Thus, ILA

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[41] 226 NLRB 754 (1976).

[42] 447 U.S. at 614.

Vice President Hankard testified that in 39 years of experience he had never seen a ship unloaded entirely by "scalawags." He further testified that when the ILA goes on strike against a ship, scalawags do not substitute for striking ILA longshoremen. In his words, "The Ship wouldn't be working."

In these circumstances, the inevitable consequences of the ILA boycott, which Respondents had every reason to foresee with absolute clarity, were that Russian goods would not be moved by any employees in any of the ports encompassed by the boycott, that Waterman would cease carrying Russian cargo to the boycotted ports, and that Allied would be forced to cease purchasing Russian wood for delivery to ports affected by the boycott.[43] Under the rationale of *Safeco*, Respondents must be held accountable for the foreseeable consequences of their conduct, and, regardless of their stated intent, must be held to have induced the boycott with an object of forcing the business entities involved to cease business operations among themselves and to cease handling goods of the

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[43] We find it unnecessary to our determination that Respondents have violated Sec. 8(b)(4) of the Act to pass upon the question of whether the USSR is a person, within the meaning of that section, as defined by Sec. 2(1) of the Act. Clark, Waterman, and Allied are clearly persons within that definition. The ILA induced and encouraged its members to refuse to handle goods and it coerced Clark, Waterman, and Allied. The object of this inducement, encouragement, and coercion was to force each of the neutrals to cease handling goods emanating from Russia and to require Clark, Waterman, and Allied to cease doing business with each other. See *Grain Elevator, Flour and Feed Mill Workers, ILA, Local 418* v. *N.L.R.B.*, 376 F.2d 774 (D.C. Cir. 1967), and *Madden* v. *Grain Elevator, Flour and Feed Mill Workers, ILA, Local 418*, 334 F.2d 1014 (7th Cir. 1964).

USSR.[44] By the same reasoning, Respondents must be found to have coerced and restrained these neutral parties with an object of causing them to cease doing business with each other as well as with the USSR. This result is particularly required here, where Respondents' conduct is exclusively secondary. Thus, while Respondents' primary dispute is with the USSR, none of their activity was undertaken directly against the USSR. Instead, Respondents attempted to pressure the USSR through those parties doing business with it—the very tactic Section 8(b)(4) was enacted to prohibit.[45]

A similar rationale was applied to these same facts by the First Circuit ruling in *Allied International, Inc.*, discussed above in section II. There the court stated that:

> [T]he ILA has chosen to carry out its goal of protest through action—a selective work stoppage—which by its very nature is designed to force at least partial cessation of business between companies with which the ILA has no labor-related grievance. While the ILA boycott may be a heartfelt act of protest against conduct

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[44] See also *N.L.R.B.* v. *Local 825, International Union of Operating Engineers AFL-CIO* [*Burns and Roe, Inc.*], 400 U.S. 297, 304-305 (1971); *N.L.R.B.* v. *Denver Building and Construction Trades Council, et al.* [*Gould and Preisner*], 341 U.S. 675 (1951); see, generally, *Radio Officers' Union of Commercial Telegraphers Union, AFL* [*A. H. Bull Steamship Company*] v. *N.L.R.B.*, 347 U.S. 17, 45 (1954).

[45] Nor can Respondents be heard to argue that they have no other means of furthering their primary dispute than by embroiling neutral employers in it. Respondents could, for example, have picketed the Russian embassy and Russian consular offices in various cities throughout the United States.

that the ILA leadership and many ILA members find "repugnant," we cannot accept the proposition that this negates a finding that the "objective" of the boycott is one proscribed by section 8(b)(4). Nor do we think that this section was meant to permit any and all union actions designed to keep union members from "doing unconscionable work" or to protect their "moral integrity, spiritual welfare, and political convictions. [640 F.2d at 1375.]

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We think that the object of a boycott, for purposes of section 8(b)(4)(ii)(B), can be inferred from the virtually inevitable results generated by it, at least when, as here, the union's conduct can under no reading of the facts be characterized as "primary activity" protected by the Act. [640 F.2d at 1375-76, citing *Safeco, supra.*]

The Board also used this rationale to find a violation of Section 8(b)(4)(ii)(B) in virtually identical circumstances. In *Ocean Shipping, supra,* the ILA issued a press release announcing that it would not handle cargo in ships of any owner whose vessels were used in trade with Cuba, with whom the ILA had a nonlabor dispute. Thereafter, the ILA issued specific instructions to its membership that if any specified ships arrived at any ILA port, ILA members were "forbidden to handle them." In Baltimore, the ILA repeatedly refused to work on a particular ship because it had engaged in Cuban trade.

The Board found that the ILA had violated Section 8(b)(4)(ii)(B) of the Act, because the ILA's refusal to refer work gangs to the neutral ship fitting company involved had the effect of denying the ship

fitter its customary work force.[46] Under the circumstances, the Board found that, whatever the ILA's *ultimate* object may have been in terms of eliminating trade with Cuba, certainly "an object" of the ILA's conduct was to force or require the cessation of business between the ship fitting company and the ship's owner.

Based on the above, we find that, within the meaning of Section 8(b)(4), Respondents have engaged in, and induced and encouraged their members to engage in, refusals in the course of their employment by Clark to process or otherwise handle Soviet cargoes which are owned by Allied and destined for Boston and other ports on the Atlantic Ocean and Gulf of Mexico. In addition, Respondents have threatened, coerced, and restrained Clark, Waterman, and Allied with a refusal to refer Respondents' members for unloading cargo emanating from the USSR. The objects of Respondents' above-described conduct were (1) to force or require Clark to cease doing business with Waterman and Allied, (2) to force or require Waterman to cease doing business with Allied, and (3) to force or require Clark, Waterman, and Allied to cease using, selling, handling, transporting, or otherwise dealing in the products of the USSR, each in violation of Section 8(b)(4)(i) and (ii)(B) of the Act.

The decisions of the Supreme Court, the First Circuit Court of Appeals, and the Board mandate a conclusion that we assert jurisdiction in this case and find the ILA has engaged in conduct inarguably vio-

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[46] The Board in *Ocean Shipping* expressly found no merit in the ILA's argument that the neutral ship fitting company could draw labor from other sources to work on the struck ship.

lative of Section 8(b)(4) of the Act. The Board's assertion of jurisdiction is compelled if the clear language of the Act placing foreign commerce within our jurisdiction is to have any meaning. Nothing in the Supreme Court's decisions finding implied limitations on our foreign commerce jurisdiction suggests that the Board is deprived of jurisdiction where American neutral employers are directly and adversely affected by purely secondary conduct violative of Section 8(b)(4) merely because a foreign nation is involved in the dispute. Finally, Respondents' defenses to the alleged violation of Section 8(b)(4) pale in the face of overwhelming evidence that the decision to boycott Russian cargo was orchestrated and choreographed by the ILA leadership who knew that the cessation of business among Allied, Waterman, and Clark was a foreseeable and inevitable consequences of their actions and, in fact, a desired effect. Respondents here engaged in exclusively secondary conduct—precisely the type of conduct Section 8(b)(4) prohibits.

IV.

Having found that Respondents have engaged in certain unfair labor practices, we shall order it to cease and desist therefrom and take certain affirmative action deemed necessary to effectuate the policies of the Act.

Conclusions of Law

1. Allied International, Inc., Waterman Steamship Lines, and John T. Clark and Son of Boston, Inc., and each of them are employers engaged in commerce and in operations affecting commerce within the meaing of Section 2(2), (6), and (7) of the Act.

2. International Longshoremen's Association, AFL-CIO, and Local 799, International Longshoremen's Association, AFL-CIO, collectively referred to here as Respondents, and each of them, are labor organizations within the meaning of Section 2(5) of the Act.

3. By inducing and encouraging employees of Clark, members of the Respondents, not to handle and unload goods owned by Allied and transported by Waterman, and by coercing and restraining Allied, Waterman, and Clark, with an object of forcing or requiring Allied, Waterman, and Clark to cease doing business with each other, the Respondents engaged in unfair labor practices affecting commerce in violation of Section 8(b)(4)(i) and (ii)(B) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondents, International Longshoremen's Association, AFL-CIO, and Local 799, International Longshoremen's Association, AFL-CIO, individually and collectively, their officers, agents, and representatives, shall:

1. Cease and desist from:

(a) Inducing or encouraging individuals employed by Clark, or any other persons engaged in commerce, to engage in a strike or refusal in the course of their employment to process, transport, load, unload, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services.

(b) Threatening, coercing, or restraining Allied, Waterman, and Clark, or any other persons engaged

in commerce or in an industry affecting commerce, where an object thereof is to require the above-named persons, or any other person, to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to force Allied, Waterman, and Clark to cease doing business with each other.

2. Take the following affirmative action designed to effectuate the policies of the Act:

(a) Post at its business offices and meeting halls copies of the attached notice marked "Appendix."[47] Copies of said notice, on forms provided by the Respondents' representatives, shall be posted by Respondents immediately upon receipt thereof, and be maintained by them for 60 consecutive days thereafter, in conspicuous places, including all places where notices to their members are customarily posted. Reasonable steps shall be taken by Respondents to insure that said notices are not altered, defaced, or covered by any other material.

(b) Promptly after receipt of copies of said notice from said Regional Director, return the signed copies for posting by Allied, Waterman, and Clark, those companies willing, at all places where notices to their respective employees are customarily posted.

(c) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order,

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[47] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

what steps the Respondents have taken to comply herewith.

Dated, Washington, D.C. August 28, 1981

JOHN H. FANNING, Member

DON A. ZIMMERMAN, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

MEMBER JENKINS, dissenting:

The Administrative Law Judge gave a careful, scholarly, and accurate analysis of the cases, including the controlling Supreme Court decisions. His dismissal of the complaint is correct, for the reasons he stated, and I would affirm him.

Dated, Washington, D.C. August 28, 1981

HOWARD JENKINS, JR., Member
NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO MEMBERS

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

WE WILL NOT induce or encourage individuals employed by John T. Clark & Son of Boston, Inc., or any other person engaged in commerce or in an industry affecting commerce to engage in a strike or refusal in the course of their employment to process, transport, load, unload, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services.

WE WILL NOT threaten, coerce, or restrain Allied International, Inc., Waterman Steamship Lines, or John T. Clark & Son of Boston, Inc., or any other persons engaged in commerce, or in an industry affecting commerce, where the object thereof is to require the above-named persons, or any other person, to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to force Allied International, Inc., Waterman Steamship Lines, and John T. Clark & Son of Boston, Inc., to cease doing business with each other.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

(Labor Organization)

Dated ———— By ————————————
(Representative) (Title)

LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO

(Labor Organization)

Dated ———— By ————————————
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Keystone Building, 12th Floor, 99 High Street, Boston, Massachusetts 02110, Telephone 617—223-3313.

JD-100-81
Boston, MA

UNITED STATES OF AMERICA BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Case No. 1-CC-1753

INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, AFL-CIO

and

LOCAL 799, INTERNATIONAL LONGSHOREMEN'S
ASSOCIATION, AFL-CIO

and

ALLIED INTERNATIONAL, INC.

John S. May, Esq., of Boston, MA, and *Joseph E. Mayer, Esq.*, of Washington, D.C. for the General Counsel.

Duane R. Batista, Esq. (*Nutter, McClennen & Fish*), Boston, MA, for the Charging Party.

Herzl S. Eisenstadt, Esq. (Law Offices of *Thomas W. Gleason*), New York, NY, and *Joseph T. Doyle, Esq.*, of Boston, MA, for the Respondents.

DECISION

BERNARD RIES, Administrative Law Judge: This matter was heard in Boston, Massachusetts, on August 27-28, 1980. It has two companion cases: *International Longshoremen's Association, AFL-CIO, et al.* (*Occidental Chemical Company*), Cases Nos. 10-CC-1141-1, -2, -3 and -4, and *International Longshoremen's Association, AFL-CIO, et al.* (*Kansas*

Farm Bureau, American Farm Bureau Federation, Texas Farm Bureau), Cases Nos. 23-CC-762-1, -2, -3, -4, 23-CC-763-1, -2, -3, -4, and 23-CC-764-1, -2, -3, and -4, which were heard by the undersigned, respectively, on September 4-5, 1980, in Savannah, Georgia, and on October 27-28, 1980, in Houston, Texas.

The complaints in the three cases have a common theme—that Respondent International and various of its locals violated Section 8(b)(4)(i)(ii)(B) of the Act by announcing and implementing a boycott of Russian ships and cargo in the early part of 1980. Separate hearings were conducted, however, with the Charging Parties in each case confining their participation to the proceeding to which their charges had given rise. No motion having been made that the cases be consolidated for purposes of decision,[1] and since each of the Charging Parties has played a role in only the case of particular interest to it, I shall issue separate decisions in each case. Because of the commonality of many facts and issues in the three cases, reference will be made occasionally to arguments and circumstances in cases other than the present one.

Briefs were received from the parties in all three cases on or about January 9, 1981. On the basis of the record made at the hearing,[2] my recollection of the demeanor of the witnesses, and the briefs, I make

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[1] Prior to the hearings, Respondents had moved that the three complaints be consolidated for hearing. Oppositions filed by the General Counsel and all the Charging Parties led the Association Chief Administrative Law Judge to deny the motion.

[2] The transcript of proceedings is hereby corrected as follows: at p. 9, l. 6, change "it's" to "as;" at p. 47, l. 23, change "we've" to "I've not;" at p. 218, l. 17, change "not" to "know;" at p. 229, l. 23, change "is not" to "not."

the following findings of fact, conclusions of law, and recommendation.

I. The Issues

On January 9, 1980,[3] two weeks after the invasion of Afghanistan by the Union of Soviet Socialist Republics, Respondent International President Thomas W. Gleason made the following public statement:

> In response to overwhelming demands by the rank and file members of the Union, the leadership of ILA today ordered immediate suspension in handling all Russian ships and all Russian cargoes in ports from Maine to Texas and Puerto Rico where ILA workers are employed.
>
> This order is effective across the board on all vessels and all cargoes. Grain and other foods as well as high valued general freight. However, any Russian ship now in process of loading or discharging at a waterfront will be worked until completion.
>
> The reason for this action should be apparent in light of international events that have affected relations between the U.S. and Soviet Union.
>
> However, the decision by the Union was made necessary by the demands of the workers.
>
> It is their will to refuse to work Russian vessels and Russian cargoes under present conditions in the world.
>
> People are upset and they refuse to continue the business as usual policy as long as the Russians insist on being international bully boys. It is a decision in which the Union leadership concurs.

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[3] All dates hereafter refer to 1980.

The present complaint alleges that on or about January 9, President Gleason informed Charging Party Allied by telephone that the International would not unload the cargo of a ship carrying Russian goods at any United States port other than the port of Boston. It further alleges that on or about March 12, Respondent Local 799, through its agent Edward Connolly, informed Allied that it would not unload any cargo arriving from the USSR and that until further notice to the contrary was received from Respondent International, the Russian boycott would continue. It is further alleged that on or about March 25, Respondent International, by agents William Hankard and William McNamara, informed Allied that it would not unload any of Allied's cargoes originating in the USSR and that the boycott of such goods would continue until further notice from Respondent International. The conclusion of the complaint is that by the foregoing conduct, the Respondents have induced and encouraged individuals employed by or to be employed by various secondary employers to engage in strikes or refusals to handle goods or commodities and have thereby threatened, coerced, and restrained various secondary employers with an object of forcing the secondary employers to cease handling the products of, or doing business with, the Charging Party and other persons, and of forcing the Charging Party and other employers to cease doing business with the USSR, or with other persons, all in violation of Section 8(b)(4)(i)(ii)(B) of the Act.[4]

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[4] The cited provisions state, in relevant part:

It shall be an unfair labor practice for a labor organization or its agents— . . . (4) (i) to engage in, or to induce or encourage any individual employed by any person en-

II. Findings of Fact

Charging Party Allied International engages in the importation and sale of wood products. Most of the wood imported by Allied is from the USSR; in 1979, Allied purchased Russian wood valued at some 25 million dollars. The principal port of embarkation for the shipment of Russian wood is Leningrad, and the wood is regularly transported from that location to six American ports, including Boston.

Allied contracts with Waterman Steamship Lines, a New York corporation, to perform the carriage of Russian wood to the United States. Waterman employs three vessels of United States registry, the Walton, the Middleton, and the Jefferson, to transport the Russian wood to America; these three ships spend about three-fourths of their working life carrying goods from Russia to the United States.

Waterman contracts with the Boston firm of Peabody & Lane, Inc., as the ship's agent for its vessels in that port. The stevedoring company employed by Waterman to unload ships in Boston is John T. Clark

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gaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: . . . (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . ..

& Son of Boston, Inc. Clark is a member of the Boston Shipping Association, an employer organization which represents the four stevedoring companies in the port of Boston and which is party to a collective-bargaining agreement with Respondent International, Respondent Local 799, and two other ILA locals.

The bargaining agreement makes provision for the establishment of a hiring hall from which Clark obtains its longshore employees. The hiring hall has organized 12 permanent gangs used to load and unload ships, each gang consisting of 20 men. When a gang is incomplete, other individuals may be called to fill in the vancancies. According to John Murphy, an official of the Boston Shipping Association, in the course of a month, perhaps five fill-in employees per day are required. Some of the employees so used are nonunion employees ("scalawags"). While Murphy testified that he has seen as many as 25 nonunion employees present in the hall at one time, he has never heard of an entire gang composed of nonunion individuals. William Hankard, an international vice president of Respondent, also testified that in his 39 years of experience, he has never seen a ship unloaded by an entirely nonunion gang. Murphy testified that certain of the jobs, such as operation of the sling and the winch, are "very specialized" and require experience; Hankard said that while he has seen nonunion employees operating such equipment as forklifts and automobiles, he has not witnessed them operating other kinds of equipment on the docks.[5]

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[5] Article 18 of the bargaining agreement provides, in part, "Extra-dock labor may be utilized to fill-out incomplete gangs working at that terminal and/or pier when no additional men required by the Employer are available at the Hiring Hall."

On January 9, the day on which President Gleason issued his public statement, the Walton arrived in Boston and began discharging a portion of its cargo of Russian wood.[6] Reacting to Gleason's announcement, Edward Gildea, president of Allied, and Morton Waldfogel, Allied's treasurer, placed a telephone call to Gleason to ask him if he would permit the Walton to finish unloading in Boston and then to complete its schedule at the other three ports. Both Gildea and Waldfogel testified, without contradiction, that Gleason said that "he had to draw a line some place" and that while the Boston unloading would be completed, the Walton could be discharged at no other port.[7] The following day, Waterman cancelled the Walton's visit to the other three ports and, instead, discharged the remaining wood in Boston.

Due to the apprehension of Allied and Waterman that longshoremen would not unload Russian wood in any American ports, the Middleton, which was to arrive with a shipment of wood from Leningrad in late January, was diverted to Montreal, where it eventually unloaded its cargo, and the Jefferson, which was in Leningrad, apparently was forced to leave without carrying freight. In late January, because of the attendant uncertainties, Allied and the Russian agency with which it contracts renegotiated their agreements and reduced Allied's purchases of wood by a value of some 16 million dollars.

Allied President Gildea testified, without controversion, that on March 12 he called Edward Con-

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[6] The remainder of the cargo was destined for Wilmington, North Carolina, Charleston, and Houston.

[7] It should be noted that, on cross-examination, Gildea testified that Gleason attributed the boycott decision to "the rank and file."

nolly, a business agent with Respondent Local 799, to determine whether anything had changed with regard to unloading a ship carrying Russian wood in Boston.[8] Connolly said that he knew of no change and that if there was to be any, it would have to come from International Vice President Hankard. Connolly also stated that Hankard would have to check with President Gleason to ascertain whether ships could be handled in Boston.

John Kaires, a vice president of Allied, testified that he and others met on March 25 with Hankard and William McNamara, another vice president of the International Union. According to Kaires, when Hankard was asked whether the Union would handle Russian cargo in Boston, Hankard replied that the Union position had not changed, but that he would discuss with Gleason at a meeting scheduled to be held the following day in New York "the matter of the possibilities of handling Russian cargo in the port of Boston." Kaires stated that Hankard also said that "the local stevedores did what they were told to do." Hankard testified, and Kaires on rebuttal "absolutely" denied, that in his discussion with Kaires he had referred only to attempting to ascertain in New York whether there had been a change in the desires of the "rank and file" members about the boycott; he did not recall mentioning Gleason to Kaires. It is my belief, based on my impression of the witnesses and the circumstances, that Kaires' version of the conversation was closer to the truth.

It appears that, as of the date of hearing, Allied had been unable to transport Russian wood directly

[8] The U.S. District Court for the Southern District of Georgia had, on March 4, issued an injunction against the ILA boycott in the ports of Savannah and Brunswick.

to the United States as a result of the boycott. Apparently, Waterman was only willing to transport cargo from Russia to Canada since the January events.

Respondents attempted here, as in the companion cases, to demonstrate that nonunion labor might have been obtained to work the Russian cargo. It seems fairly evident from the testimony that any such effort would have been unavailing. I doubt that a fully-trained gang of 20 nonunion employees could have been found to unload the Walton or the other vessels. I further note that even though Hankard testified that "employers have worked ships in the port of Boston when we've been on strike," he also testified that "scalawags" do not work ships when there is a strike going on because "the ship wouldn't be working."

Respondents undertook at the hearing the bootless task of establishing that Gleason's January 9 statement was merely advisory, and, on brief, they attack "General Counsel's attempt to characterize President Gleason's statement as an 'order'." Since Gleason himself used that word twice in his announcement, and since he even defined the breadth of his directive to provide that loading or discharging currently being done "will be worked until completion," General Counsel's characterization hardly seems ill-founded. Plainly, Gleason intended the statement to be binding on members of the Union; plainly, Gleason intended that they understand it to be obligatory; and plainly, the Union officials who testified so understood it.

There is little support here, as in the other cases, for the related claim that Gleason's directive merely expressed the overwhelming desire of the membership. Hankard did testify, without contradiction,

that only a few hours before Gleason's announcement on January 9, he received a call that longshoremen working a ship at Castle Island wanted to leave work because of the Russian cargo they were handling. Hankard said that he went to the ship and quelled the rebellion, and the men continued to perform their work. He also testified, however, that prior to Gleason's statement, he had received no indication of a groundswell for a Russian boycott from any of the eight ports under his jurisdiction. Gleason did not appear in any of these hearings to give testimony about a flood of sentiment pouring in on him from ILA members throughout the nation, and I am inclined to believe that he was not so inundated.[9]

III. Jurisdiction

At the threshold, Respondents interpose a challenge to the assertion of Board jurisdiction in these cases.

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[9] As set out hereafter, I have concluded that the complaints in all three companion cases should be dismissed for want of jurisdiction. I shall include the legal discussion on this point only in the instant decision.

Because the relevant facts of the other two cases differ somewhat from the present factual setting, I note that in *Occidental Chemical Company*, the evidence showed that in Savannah, in the aftermath of President Gleason's directive, an ILA local president confirmed that his local would not handle a foreign-flag ship carrying Russian ammonia purchased by Occidental, and a similar incident occurred in Brunswick, where another ILA local president refused to furnish longshoremen for a vessel, perhaps British-owned and perhaps under Liberian registry, bringing Russian potash bought by Occidental; and in *Kansas Farm Bureau*, the testimony established that in Houston, the presidents of two ILA locals indicated that they would not supply longshoremen so that a Russian-chartered Belgian ship could load grain being purchased by the USSR from an American grain dealer.

Relying on a line of opinions issued by the Supreme Court between 1957 and 1974, Respondents contend that the present disputes are not in "commerce" and are therefore beyond the jurisdictional reach of the Labor Board. That the issue presented is a difficult one and that Respondents' contention is respectable can hardly be gainsaid; only recently, faced with the same claim arising out of this very controversy, the Court of Appeals for the Fifth Circuit, construing the Supreme Court precedents, has concluded that the Board is without jurisdiction of this matter, and a divided panel of the Court of Appeals for the First Circuit has effectively held to the contrary. In these circumstances, it is appropriate to consider in some detail the Supreme Court authorities whose contours are thus drawn into question.

A. *The Supreme Court Cases*

The line began with *Benz et al.* v. *Compania Naviera Hidalgo, S.A.*, 353 US 138. A foreign-owned ship, sailing under a foreign flag, was struck by its foreign-national crew while temporarily in the harbor at Portland, Oregon. Three American unions picketed in support of the crew. The shipowner filed under state law for injunctive relief and damages against the unions. The issue presented to the Supreme Court was whether the Labor Management Relations Act preempted the field so as to leave the trial court without jurisdiction.

The Supreme Court concluded, after review of the legislative history of the Act, that Congress was concerned only with "industrial strife between American employers and employees." Deducing that Congress

had no specific intention to make the Act applicable to other than domestic disputes, the Court stated:

> The seamen agreed in Germany to work on the foreign ship under British articles. We cannot read into the Labor Management Relations Act an intent to change the contractual provisions made by these parties. For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed.

The effect of the ruling was to uphold the award of damages by the lower court under Oregon law against representatives of the unions.

Six years later, the Court decided McCulloch [10] and *Incres*.[11] In *McCulloch*, the Supreme Court rebuffed an effort by the Board to hold a representation election among the seamen on certain Honduran-flag vessels which had points of contact with the United States, including ultimate ownership by an American company. The Court adhered to its belief earlier expressed in *Benz* that Congress had failed to give any indication that the Act contemplated Board jurisdiction over "maritime operations of foreign-flag ships, employing alien seamen." It noted, in addition, the established rule of international law that the law of the flag state ordinarily governs the internal affairs of the ship; and that, in the case before it, the employees were already represented by another union certified under Honduran law. The Court raised the possibility that sanctioning Board jurisdiction might

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[10] *Frank W. McCulloch, Chairman* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10.

[11] *Incres Steam Ship Company, Ltd.* v. *International Maritime Workers Union, et al.*, 372 U.S. 24.

lead the Board to inquire into the "internal discipline and order of all foreign vessels calling at American ports," which activity "would raise considerable disturbance not only in the field of maritime law but in our international relations as well." It further foresaw "questions of such international import [that] would remain as to invite retaliatory action from other nations as well as Honduras." The Court concluded, as it had in *Benz*, that it would not divine that Congress had in fact exercised such authority in this "delicate field of international relations . . . [without] the affirmative intention of the Congress clearly expressed."

In *Incres*, an American union attempted to organize foreign seamen on two foreign-owned, and foreign-flag, ships. They picketed the ships, and the foreign shipowner brought an action in the New York courts for damages and injunctive relief. The New York Court of Appeals held that state court jurisdiction was preempted. The Supreme Court reversed, applying the holding of *McCulloch* that "the Act had no application to the operations of foreign-flag ships employing alien crews," and for the first time linking this construction of the Act to the statutory provisions which define the terms "commerce" and "affecting commerce." [12] In the instant case, said the Court,

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[12] Section 10(a) provides that the Board is empowered to prevent any person from engaging in any unfair labor practice "affecting commerce." Section 2(6) states:

> The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points

"[T]he IMW's activities are directly related to Incres' employer-employee relationship, since the very purpose of those activities was the organization of alien seamen on Incres' vessels." The holding below was vacated so that the New York courts might assert jurisdiction.

International Longshoremen's Local 1416, AFL-CIO v. *Ariadne Shipping Company, Ltd., et al.*, 397 US 195, was the next Supreme Court case construing the *Benz* doctrine and the only one thus far to hold that the Act affords preemptive jurisdiction over activities relating to a foreign-flag vessel. The case involved two foreign-owned, foreign-flag, cruise ships which operated between Florida ports and the Caribbean. When the ships were in American ports, they engaged some American longshoremen to do loading work. An American union picketed the vessels with placards protesting that the longshore work was being done under substandard wage conditions. The Florida courts granted injunctive relief to the foreign shipowners.

The Supreme Court thought that this case differed sufficiently from the ones previously decided so as to permit a conclusion that Congress would have desired that the Board assert jurisdiction in these circumstances. This was not a situation in which Board

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in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

Section 2(7) provides:

The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

regulation of the aspect of labor relations in question would necessitate inquiry into the "internal discipline and order" of a foreign vessel which might "raise considerable disturbance not only in the field of maritime law but in our international relations as well." Unlike the prior three cases, invocation of Board jurisdiction in *Ariadne* would not likely provoke "vigorous protests from foreign governments and . . . international problems for our government," or "invite retaliatory action from other nations." Nor was there any showing that such assertion of jurisdiction would depart from "the well-established rule of international law that the law of the flag state ordinarily governs the internal affairs of a ship." The Court, holding that the "longshore activities of such American residents" were not within the exempted area marked out by *Benz* and its progeny, stated:

> [T]his dispute centers on the wages to be paid American residents, who were employed by each foreign ship not to serve as members of its crew but rather to do casual longshore work. There is no evidence that these occasional workers were involved in any internal affairs of either ship which would be governed by foreign law. [Footnote omitted.] They were American residents, hired to work exclusively on American docks as longshoremen, not as seamen on respondents' vessels.

Concluding that "application of United States law to resolve a dispute over the wages paid the men for their longshore work, accordingly, would have threatened no interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law," the Court held that "these

longshore operations were in 'commerce' within the meaning of" the Act and that, since the picketing was arguably protected by the Act, Florida law was accordingly preempted.

Four years later, in 1974, the Court decided *Windward Shipping (London) Limited, et al.* v. *American Radio Association, AFL-CIO, et al.*, 415 US 104. In that case, several American maritime unions, concerned about the loss of jobs available to their members, agreed to take collective action against foreign vessels which they perceived as a principal cause of the situation. They picketed two foreign-owned vessels in Houston with signs calling attention to the substandard wages paid to the foreign crews and the consequent plight of American seamen.[13] The effect of the picketing was to cause longshoremen and other port workers to refuse to cross the picket lines. The shipowner sought injunctive relief in a Texas court. The Texas Court of Appeals held that the picketing did not interfere with the "maritime operations of foreign-flag ships" under the *McCulloch* standard and that the activity was arguably protected under Section 7 of the NLRA; accordingly, that court denied the request for injunction.

In reviewing *Benz* in *Windward*, the Supreme Court attributed its result not only to the "clear Con-

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[13] The signs read:

Attention To The Public

The Wages and Benefits Paid Seamen Aboard The Vessel Theomana [Northwind] Are Substandard To Those of American Seamen. This Results In Extreme Damage To Our Wage Standards And Loss To [sic] Our Jobs. Please Do Not Patronize This Vessel. Help The American Seamen. We Have No Dispute With Any Other Vessel On This Site.

gressional purpose to apply the LMRA only to American workers and employers," but also to reluctance on the part of the Court "to intrude domestic labor law willynilly into the complex of considerations affecting foreign trade." It further characterized *Benz* and the other cases which had denied jurisdiction to the Labor Board as recognition that "Congress, when it used the words 'in commerce' in the Labor Management Relations Act, simply did not intend that Act to erase longstanding principles of comity and accommodation in international maritime trade." The Court went on to acknowledge that the picketing activities in the case before it did not involve the "inescapable intrusion" into the affairs of foreign ships that was present in *Benz* and *Incres*, since neither the representation of the foreign crews nor support for such crews in their own wage disputes was implicated. However, the Court said, "[T]hose cases do not purport to fully delineate the threshold of interference with the martime operations of foreign vessels which makes the LMRA inapplicable." In explaining why that threshold was crossed on the facts before it, the Court stated:

> The picket signs utilized at the docks where the North Wind and Theomana were tied up protested the wages paid to foreign seamen who were employed by foreign shipowners under contracts made outside the United States. At the very least, the picketers must have hoped to exert sufficient pressure so that foreign vessels would be forced to raise their operating costs to levels comparable to those of American shippers, either because of lost cargo resulting from the longshoremen's refusal to load or unload the

vessels, or because of wage increases awarded as a virtual self-imposed tariff to regain entry to American ports. Such a large scale increase in operating costs would have more than a negligible impact on the "maritime operations" of these foreign ships and the effect would be by no means limited to costs incurred while in American ports. Unlike *Ariadne*, the protest here could not be accommodated by a wage decision on the part of the shipowners which would affect only wages paid within this country.

In this situation, the foreign vessels' lot is not a happy one. A decision by the foreign owners to raise foreign seamen's wages to a level mollifying the American pickets would have the most significant and far-reaching effect on the maritime operations of these ships throughout the world. A decision to boycott American ports in order to avoid the difficulties induced by the picketing would be detrimental not only to the private balance sheets of the foreign shipowners but to citizenry of a country as dependent on goods carried in foreign bottoms as is ours. Retaliatory action against American vessels in foreign ports might likewise be considered, but the employment of such tactics would probably exacerbate and broaden the present dispute. Virtually none of the predictable responses of a foreign shipowner to picketing of this type, therefore, would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate. This case, therefore, falls under *Benz* rather than under *Ariadne*. [Footnote omitted.]

Justice Brennan, joined by Justice Douglas and Marshall, dissented. The dissent construed the ma-

jority opinion as holding that the Act did not apply simply "because the *economic impact* upon foreign shipping from respondents' picketing might severely disrupt the maritime operations of foreign vessels," and the dissent contended that in fact the prior cases rested squarely upon quite different, and more limited, criteria—that Congress would have disapproved exercise of jurisdiction only over those cases which allowed "Board cognizance of a dispute [which] will necessarily involve Board inquiry into the *labor relations* between foreign crews and foreign vessels." (Emphases in original.) Justice Brennan argued that, under the precedents, the only appropriate issue is whether "NLRB cognizance of respondents' picketing would require that the Board 'inquire into the internal discipline and order' of foreign vessels," and that, under such a test, *Ariadne* would apply here. He also believed that the question of whether the dispute could be accommodated "by a wage decision on the part of the shipowners which would affect only wages paid within this country" was irrelevant because the picketing was not in fact "directed at forcing the shipowner to make that or any other accommodation that could be characterized as interference with relations between crew and shipowners. Respondents' target is to persuade shippers not to patronize foreign vessels, and respondents have no concern with the form of the shipowner's response that makes their efforts succeed." Justice Brennan went on to point out that the unions' effort to foster use of domestic shipping was entirely consistent with national policies in the maritime field and found it most unlikely that Congress was satisfied to allow the states to resolve the problem, saying, "It is inconceivable that Congress meant to leave regulation

of activity in this area of predominantly national concern to disparate state laws reflecting parochial interests."

Later in 1974, the Court was again confronted with a legal issue arising out of the same picketing campaign which had resulted in the *Windward* decision. In *American Radio Association, AFL-CIO, et al.* v. *Mobile Steamship Association, Inc., et al.*, 419 U.S. 215, the unions which had participated in the picketing in the *Windward* case engaged in similar conduct at another port, directed against another foreign ship. The legal posture of the case, however, was different. Whereas in *Windward* the plaintiff in the Texas court had been the shipowner, in *Mobile* the plaintiffs seeking an injunction in the Alabama court were the stevedoring companies which had desired to service the picketed ships and the shippers who had wished to have their crops loaded onto it. In *Windward*, the petitioning unions, seeking to assert Federal preemption, had contended that their Houston picketing was protected under Section 7 of the Act. The same unions contended in *Mobile* that, with respect to the effect of their conduct on the stevedores and the shippers, such conduct arguably constituted a secondary boycott prohibited by Section 8(b)(4) of the Act. The unions attempted, in other words, to persuade the Court that an independent controversy existed between them and the stevedoring and shipping companies which was subject to the jurisdiction of the Board, despite the fact that the dispute between the unions and the shipowner was not.

The Court majority found anomalous the claim that a state court might have jurisdiction over a complaint filed by a foreign shipowner but would be ousted of jurisdiction when the stevedore with whom the shipowner would have dealt itself sought an

injunction against the union for conduct arising out of the same dispute. The majority did not "believe . . . that the line of cases commencing with *Benz* and culminating in *Windward* permit such a bifurcated view of the effects of a single group of pickets at a single site."

The majority noted its previous reference in *Windward* to the effect of the picketing on secondary employers ("lost cargo resulting from the longshoremen's refusal to load or unload the vessels") and the recognition there that the effect of picketing on the "maritime operations of foreign ships" would be produced in large part by the refusal of the American workmen employed by domestic stevedoring companies to cross the picket line in order to load and unload cargo. Such a conclusion, the Court stated in *Mobile*, "inevitably flows from the fact that the response of the employees of the American stevedores was a crucial part of the mechanism by which the martitime operations of the foreign ships were to be affected." It followed, therefore, that "the fact that the jurisdiction of the state courts in this case is invoked by stevedores and shippers does not convert into 'commerce' activities which plainly were not such in *Windward*." In summary, the Court concluded:

> Here, neither the farmer seeking to ship his soybeans, the stevedores who contracted to unload the cargo of the foreign-flag vessel, nor the longshoremen whom the stevedores employed to carry out this undertaking, were for these purposes engaged in or affecting commerce within the purview of the National Labor Relations Act. Therefore the petitioners' picketing did not even "arguably" violate § 8(b)(4) of the Act. Since Congress did not intend to strain through the

> filament of the NLRA picketing activities which so directly affect the maritime operations of foreign vessels, we hold that the Alabama courts were competent to apply their own law . . ..

Three members of the Court joined Justice Stewart in dissent. In the view of the dissenters, a substantial difference existed between the issue of "jurisdiction over a dispute between the owners of foreign-flag vessels and American maritime unions" (*Windward*) and "whether state courts have jurisdiction over a complaint by an association of American stevedoring companies that secondary pressure caused by the picketing of American maritime unions constituted a wrongful interference with the American companies' right to carry on their lawful business." The gravamen of the latter complaint, argued the dissent, "is precisely the type of concerted activity made subject to Board regulation by § 8(b)(4)(B) of the LMRA . . . ." If, as in *Ariadne, supra*, it was true that the longshoremem serving foreign-flag vessels are indeed in "commerce" and thus subject to the regulatory power of the Board, their employers must similarly be "engaged in commerce or in an industry affecting commerce" within the meaning of Section 8(b)(4)(B). On the assumption that the majority of the Court would allow the Board to exercise jurisdiction over the secondary aspect of the case had the unions been involved in a primary dispute with American-flag shipowners, Justice Stewart found anomalous that the Section 8(b)(4)(B) jurisdictional requirement should depend "entirely on whether in a particular case a primary labor dispute to which the stevedoring company was not privy was between an American union and an American-flag shipowner or an American union and a foreign-flag shipowner."

The dissent perceived no considerations of comity, no intrusion of domestic labor law into foreign trade, and no thrusting of the Labor Board into the delicate field of international relations, by holding that the Board had exclusive jurisdiction over the alleged secondary conduct in the case at hand: "Certainly a Board decision that secondary pressure violated § 8(b)(4)(B) would not risk interference with international maritime trade. Nor would a decision that the secondary pressure did not violate Section 8(b)(4)(B) endanger the foreign-flag shipowners' interests in preserving the integrity of their maritime operations from the impact of the unions' picketing. These interests are fully protected under *Windward Shipping* by permitting the foreign shipowner to seek an injunction in state court."

In arguing that the primary and secondary aspects of the unions' conduct were legally separable for purposes of jurisdiction, Justice Stewart noted that the only two Courts of Appeals that appeared to have addressed the question "have also sustained Board jurisdiction over secondary disputes involving American employers and unions despite the fact that the primary dispute involved foreign-flag vessels," citing *Madden* v. *Grain Elevator, Flour and Feed Mill Workers, International Longshoremen Assn., Local 418*, 334 F.2d 1014 (C. A. 7), and *Grain Elevator, Flour and Feed Mill Workers, International Longshoremen Assn., Local 418* v. *NLRB*, 376 F.2d 774 (C. A. D.C.). Those two cases arose out of the same controversy. A Canadian union was involved in a labor dispute with a Canadian shipping company. In order to support the Canadian union in that dispute, an American union which represented employees of an American grain shipper induced its members at an American port to cease loading the American em-

ployer's grain onto ships owned by the Canadian employer. In both cases, the Courts of Appeals tersely rejected the contention that the Board, by virtue of *Benz* and *Incres*, lacked jurisdiction over the American union's conduct in this country. The *Madden* Court stated succinctly (334 F.2d at 1019):

> [N]o attempt is being made to regulate or to apply the Act to the "internal management or affairs" of the Upper Lakes ships; the injunction does not regulate the internal affairs of its ship. No conflict between American and Canadian policies can result from halting an illegal secondary boycott in this country, directed against an American employer by an American labor organization and involving employees working in a domestic plant of the American employer.

In evident response to the citation of the *Grain Workers* cases by the *Mobile* dissent, the *Mobile* majority appended the following footnote to its textual conclusion that "[t]he fact that the jurisdiction of the state courts in this case is invoked by stevedores and shippers does not convert into 'commerce' activities which plainly were not such in *Windward*":

> In so holding, we need cast no doubt on those cases which hold that the Board has jurisdiction under Section 8(b)(4) of domestic secondary activities which are in commerce, even though the primary employer is located outside the United States. See [the *Grain Workers* cases].

B. *Discussion*

In assessing the applicability of the *Benz-Mobile* doctrine to the instant boycott, two discrete questions may require decision. The first issue is the reach

of the *Benz-Windward* line—what are its metes and bounds, what are the pertinent criteria in testing whether union conduct is not in "commerce" so as to deprive the Labor Board of jurisdiction over it. The second question which would arise, in the event of a conclusion that the "primary" dispute here might be considered, under the theories propounded in *Benz-Windward*, beyond the Board's supervisory power, is whether the dispute may nonetheless be subject to Board regulation because of its secondary character, being, it is argued, less like *Mobile* than like the *Grain Workers* cases apparently approved by the *Mobile* Court.

It should be noted that from the point of view of the Respondents and the Charging Parties, the real, practical, essential issue appears to be a narrow one: the choice of forum in which relief will be sought. As the cases reviewed above indicate, a holding that the Board is without jurisdiction leaves those parties which feel aggrieved by the respondents' conduct the alternative of pursuing state court remedies; the cases also suggest that state law may often be more hospitable to claims against unions than the NLRA would be. However, although the pragmatic stakes in the present cases may not be as consequential as the considerable litigation to which the dispute has given rise might suggest, the proper application of the Supreme Court doctrine is an analytical challenge of the first water.

1. The Applicability of *Benz-Windward* (Without Regard to *Mobile*).

Long before *Benz*, it had been accepted that Congress is capable of applying American law to foreign ships voluntarily entering American territorial limits.

Wildenhus's Case, 120 U.S. 1. Furthermore, it has been said that the "commerce" jurisdiction of the Labor Board is a broad grant by Congress of "the full sweep of its constitutional authority." *Polish National Alliance* v. *NLRB*, 322 U.S. 643, 647. The question in the foreign-flag cases has always been whether it may nonetheless fairly be inferred that Congress, for considerations of national and international importance, intended to impose limitations on the Board's jurisdiction in particular circumstances.

The first cases in this line were much of a piece. It may reasonably be said that *Benz*, *Incres*, and *McCulloch* all concerned efforts by American unions to involve themselves in the labor relations of foreign vessels, with no apparent resultant benefit to American workingmen. The Supreme Court was of the view that in the absence of any expression of affirmative intention, it was inappropriate for the Court to conclude that Congress desired the Court "to run interference in such a delicate field of international relations" "where the possibilities of international discord are so evident and retaliative action so certain." *Benz*, 353 U.S. at 147.[14]

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[14] The repeatedly expressed fear in these cases of disrupting international relations and offending principles of comity does not specifically deal with two factors which seem to make these concerns less threatening. One is that, in all of the cases except *McCulloch*, the only apparent role which the Board might have played, on the facts in each case, would have been the potential issuance or withholding of an injunction against the picketing American union. I am uncertain how the entry of such an order, or the failure to enter one, would necessarily constitute a direct intrusion into international affairs. Furthermore, the issue in each case,

In *Windward*, however, the doctrine seemed to take a new tack. Justice Brennan argued in dissent that while the earlier cases had refused to permit "Board cognizance of a dispute [which] will necessarily involve Board inquiry into the *labor relations* between foreign crews and foreign vessels," the majority view in *Windward* was withholding Board jurisdiction "because the *economic impact* upon foreign shipping from respondents' picketing might severely disrupt the maritime operations of foreign vessels." 415 U.S. at 118 (emphasis in original). The *Windward* majority seemed to agree that it was engaging in an expansion of the prior cases, conceding that the picketing before it did not "involve the inescapable intrusion into the affairs of foreign ships that was present in *Benz* and *Incres*," but holding that those cases "do not purport to fully delineate the threshold of interference with the maritime operations of foreign vessels which makes the LMRA inapplicable." *Id.* at 114.[15]

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except *McCulloch*, was whether state law was preempted by the Labor Act. The decisions in *Benz*, *Incres*, *Windward*, and *Mobile* that state laws could be applied would seem to present at least the same threat of international disruption that Board jurisdiction would foretell.

[15] It may be wondered why the majority chose to agree that *Windward* was a somewhat different breed of cat than the prior cases, and to engage in speculation about the economic implications of the picketing there. At least superficially in *Windward*, it might have been said that the American picketing which complained of substandard foreign wages was certainly as intrusive into the foreign employer-employee relationship as was the *Benz* picketing which offered American support to a strike by a foreign crew against its foreign employer; the *Benz* language about exempting from Board jurisdiction an attempt "to change the contractual provisions

Windward thus seemingly broadened the *Benz* principle, at two levels. In addition to conduct or situations which threatened to constitute potential intrusion into foreign labor relations, the *Windward* mode of analysis seemed to remove from Board jurisdiction the regulation of conduct which promised a substantial adverse economic effect upon foreign trade. And, by so expanding the inquiry, the issue no longer focused on the effect of "Board cognizance of a dispute," or whether the exercise of Board jurisdiction "would require the Board to examine into" foreign labor relations, or whether assertion of Board jurisdiction "would necessitate Board inquiry into the relations" (all the words of dissenting Justice Brennan in analyzing, in *Windward*, the prior cases); the majority rationale in *Windward* spoke only in terms of the potential economic effects of the picketing activities there.

As discussed by the *Windward* majority, there seem to be two principal determinants of whether a *Windward* situation is present: the objective of the union and the predictable impact of its conduct. Thus, the Court stated that "[a]t the very least," the union "must have hoped" to cause the forign vessels to raise their operating costs, either as a result of losing revenue or of capitulating to the picketing by increasing the wages of the foreign seamen. The end thus presumably desired by the union would have a "more

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made by these [foreign] parties," 353 U.S. at 146-147, it would seem, would have fit the *Windward* facts with a fair degree of comfort. One might assume that the Court refrained from such a mechanical analysis because it perceived that the picketing had a principal objective of shutting out foreign vessels rather than merely making them competitive with the domestic fleet.

than negligible" impact of the maritime operations of the ships, and could not be "accommodated by a wage decision on the part of the shipowners which would affect only wages paid within this country." Further, a decision by the shipowners to increase their seamen's wages would have "the most significant and far-reaching effect on the maritime operations of these ships throughout the would;" absent such a decision, the alternative choice by the shipowners of boycotting American ports "would be detrimental not only to the private balance sheets of the foreign shipowners but to citizenry of a country as dependent on goods carried in foreign bottoms as in ours," bringing, in addition, the threat of "[r]etaliatory action against American vessels in foreign ports" which would probably exacerbate and broaden the present dispute."

In concluding its analysis, the Court arguably applied a test somewhat less expansive in tone than that connoted by the speculative auguries previously set out, and if the twice-used word "therefore" were to be given its full weight, the test might be said to be both clear and exclusive: "Virtually none of the predictable responses of a foreign shipowner to picketing of this type, therefore, would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate. This case, therefore, falls under *Benz* rather than under *Ariadne*."

In the present cases, the president of Respondent International issued a directive to Union members to suspend the handling of "all Russian ships and all Russian cargoes" in American ports, and subordinate Union officials complied with his order. As in *Windward*, "[a]t the very least" the Respondent Union "must have hoped" to make the use of Russian ships

and the carrying of Russian cargo disadvantageous and counterproductive; at the ultimate, as assuredly was also the case in *Windward*, the Union here sought to bring an end to the use of such ships and the transport of such cargo.[16] Like *Windward*, the end result of the Union conduct, if successful, threatened "more than a negligible impact" on the maritime operations of foreign ships and on the business of foreign entities engaged in Russian trade.

As in *Windward*, "the protest here could not be accommodated by a wage decision on the part of the shipowners which would affect only wages paid within this country;" the only decision which would mollify Respondents "would have the most significant and far-reaching effect" on the operations of Russian shipowners (i.e., the Soviet government) and on Russian purveyors and purchasers of goods (i.e., the Soviet government); a determination by the Russian authorities to boycott American ports rather than withdraw from Afghanistan "would be detrimental not only to the private balance sheets of the foreign shipowners but to citizenry of a country as dependent on goods carried in foreign bottoms as ours;" "[r]etaliatory action against American vessels in [Russian] ports" might follow, which would "probably exacerbate and broaden the present dispute;" and finally, none of the "predictable responses" to the Respondents' conduct "would be limited to the sort of

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[16] The pickets in *Windward*, as earlier noted, complained of substandard foreign wages which resulted in "extreme damage to our wage standards and loss to [sic] our jobs," and asked the public to "not patronize this vessel" and to "help the American seamen." The objective of the picketing was, in one way or another, to cause a diminution in the use of foreign vessels and an increase in the use of American ships and crews.

wage-cost decision benefiting American workingmen which the LMRA was designed to regulate—"indeed, in the present case, the Respondents sought no economic advantage or benefit for its members by the conduct in which they engaged.

After thus parsing, and then tracking, the components upon which *Windward* relied in concluding that the Board was without jurisdiction, it seems to me difficult to reach a different result in the present case. There are, very obviously, factual variations, but I cannot, in laying them next to the *Windward* language, perceive those differences as significant ones. It may seem to me that there would have been a greater theoretical chance for the American unions in *Windward* to have achieved a wage objective (although it is not easy to say that they were doing anything other than attempting to put the foreign ships out of business) than for the present Respondents to have caused the Russian government to withdraw from Afghanistan, but it may certainly be said that the sort of international reverberations about which the Court speculated in *Windward* can equally be conjectured here.

And, of course, none of the "predictable responses" to the present conduct "would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate." The Respondents' action were entirely unrelated to the advancement of the interests customarily served by unions; they were wholly "political" in nature, and in fact detrimental to the immediate interests of longshoremen, by causing a reduction in the work available to them. It would seem a curious thing to hold that a union is *not* involved in "commerce," and not subject to Board jurisdiction, when, as in *Windward*,

it pursues a labor-oriented objective, beneficial to its members, by traditional union methods which promise to have an impact upon foreign trade, but *is* in "commerce", and therefore within Board jurisdiction, when it pursues a non-labor-oriented objective by similar methods which promise to have a similar impact.

This latter reasoning appealed to the Court of Appeals for the Fifth Circuit, which held, in *Baldovin* v. *International Longshoremen's Association, AFL-CIO, et al.*, 626 F.2d 445, that the conduct presently under consideration was not in "commerce" within the meaning of the *Benz* family of cases. In *Baldovin*, the Court was considering consolidated appeals from a District Court decision denying a Section 10(1) injunction sought by the Board Regional Director in Houston (here the *Kansas Farm Bureau* case) and from another District Court decision granting such an injunction in Savannah and New Brunswick (presently the *Occidental* case). In concluding that there was not even "reasonable cause" to believe that the Union had violated Section 8(b)(4), the Court reasoned as follows (*id.* at 450-454):

> As we have seen, however, the secondary boycott prohibition was designed to narrow the labor controversy into a confrontation between the primary opponents. If one of those opponents is not subject to the NLRA, for example, because it is a foreign entity or a foreign nation, and if the objective of the union is to obtain concessions of a kind that could not be achieved either by domestic action or by labor disputes of the kind encompassed by the NLRA, the boycott ban would be merely a prohibition devoid of its function. Seeking to restore the secondary boycott pro-

visions to their purpose, the Supreme Court has interpreted the commerce provisions in the statute to import two separate purposes: they set forth the basis for congressional action and the limitation on that action in accordance with constitutional concepts traditionally incorporated by those terms; in addition they limit the statutory scope of the secondary boycott provisions to those boycotts that could be remedied by domestic action.

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The Board's recent decision in *National Maritime Union of America and Shippers Stevedoring Company*, 245 NLRB No. 29 (1979), is based on the *Windward-Mobile* rationale. In *Shippers Stevedoring* a union representing United States seamen picketed a U.S.S.R. flag ship with signs protesting the use of U.S.S.R. vessels, instead of United States ships, to transport foreign cargo purchased with United States tax dollars in violation of the Cargo Preference Act, 46 U.S.C. § 1241(b)(1). Because the picketing was aimed at replacing the foreign ship and its foreign crew with a United States ship and a United States crew, the Board viewed the picketing as directly affecting the "maritime operations" of the foreign ships. Therefore, the Board found the picketing activities to be not "in commerce" within the meaning of the LMRA.

The Board itself recognized in *Shippers Stevedoring* that the *Windward-Mobile* rationale cannot be confined to union efforts directed toward changing shipboard conditions of employment. The union that was picketing in *Shippers Stevedoring* could not be mollified by a change in shipboard wages or employment conditions, nor would a wage-cost adjustment by the shipowner

end the dispute. The Board adopted as the touchstone for determining whether a particular activity affects commerce the foreignness of the objective of those engaged in the activity and the degree of intrusion into the affairs of the foreign entity which will be brought about by the entity's response to the activity in question.[17]

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These union activities, a political protest against the political actions of a foreign government, in comparison with the union activities in *Windward* and *Mobile*, are even further removed from the type of domestic labor relations that the Act was intended to cover. *Windward* and *Mobile* cannot be distinguished on the basis of the purely factual differences that the unions were there conducting "area standards" picketing directly against the foreign ships, the unions had a primary labor dispute with the foreign ships and the picketing of the vessels was designed to affect directly the internal labor relations of the foreign ships vis-a-vis their foreign crews. [Footnote omitted.]

In *Windward* as here the union objective was to compel a foreign entity to change a course of action it was taking away from our shores. If the fact that the present dispute is with a foreign government over military policy makes the activity in commerce, while a dispute with a foreign employer over its labor policy would not be in commerce, then the anomalous result would be that an injunction could not issue when labor

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[17] *Shippers Stevedoring* will be discussed in greater detail *infra*.

relations are involved but could issue when they are not.

The mere fact that a boycott or picketing is aimed at a foreign entity does not, of course, *ipso facto* preclude NLRB jurisdiction. [Footnote omitted.] The object of the dispute determines whether or not it is "in commerce." When the dispute is over the hiring of American labor in United States ports, it is "in commerce." When the dispute is over the foreign vessels' relations with its foreign employees, it is not "in commerce." When the dispute is over a foreign government's invasion of a remote nation, it is more emphatically not "in commerce."

As in *Windward* and *Mobile*, the ILA's activities are outside the coverage of the Act because of the nature of the reasonable responses that would accommodate the union's complaint. Only a political decision on the part of a foreign government can satisfy the ILA's grievance. Thus, the *Windward* rationale as recognized by the Board in *Shippers Stevedoring* compels a finding that the ILA activities do not come within the coverage of the Act. [Footnote omitted.]

* * * * *

The Supreme Court decisions whose lead we follow were reached by divided courts but they read the LMRA as drawing a domestic-foreign impact line that permits domestic unions to boycott foreign vessels with the purpose of attempting to affect foreign affairs. We attempt but to interpret the congressional intent. If we fail to recognize it, the remedy lies in the hands of Congress.

It is not unmistakably clear that the secondary boycott provision is only "designed to narrow the labor controversy into a confrontation between the primary opponents," or that the provision would be "a prohibition devoid of its function" when applied to a dispute in which the one of the opponents is not subject to the NLRB and the subject of the dispute is incapable of domestic resolution. It has been held that the secondary boycott prohibition is intended principally to protect neutral employers and may apply despite the absence of a conventional primary dispute. E.g., *National Maritime Union of America, AFL CIO* v. *NLRB*, 346 F.2d 411, 418 (C.A.D.C.). In its principal thrust, however, the Fifth Circuit reads, and approves, *Shippers Stevedoring* as adopting "as the touchstone for determining whether a particular activity affects commerce the foreignness of the objective of those engaged in the activity and the degree of intrusion into the affairs of the foreign entity which will be brought about by that entity's response to the activity in question." That formulation appears to me to be a sound reading of both *Shippers Stevedoring*, see *infra*, and *Windward*.[18]

Only recently, the Court of Appeals for the First Circuit has also had occasion to apply *Benz et alia* to a controversy arising from President Gleason's mandate. Reacting to the facts now before me in the *Allied* case, Allied sued the Union for damages in

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[18] The Court's other isolated shorthand references to the proper test—" boycotts that could be remedied by domestic action," "the object of the dispute determines whether or not it is 'in commerce'," and "the nature of the reasonable responses that would accommodate the union's compliant"—are evidently subsumed into the more comprehensive statement set out in the text.

U.S. District Court, urging three separate causes of action. One of these was a claim under Section 303 of the LMRA, which provides a private right of action for violations of Section 8(b)(4). The District Court held that Allied was not entitled to relief under Section 303; in reversing, the Court of Appeals (Senior Circuit Judge Aldrich dissenting) construed the *Benz* line of cases as affording "commerce" jurisdiction to the facts before it. *Allied International, Inc.* v. *International Longshoremen's Association, AFL-CIO*, —— F.2d —— (January 6, 1981).

The Court read *Benz* through *Windward* (with the exception of *Ariadne*) as "involv[ing] the question whether the Act affirmatively protected union activity directed at the working conditions aboard foreign-flag vessels," and thought that the Supreme Court had decided those cases as it did because "[t]o find that the picketing in *Incres*, *Benz* and *Windward* was protected by the Act would have implied the jurisdiction of the NLRB over the foreign labor conditions that gave rise to the picketing;" such an implication would, in turn, necessitate inquiry into the "internal discipline and order" of a foreign vessel.

It may be argued that the Court's reading of *Benz*, *Incres*, and *Windward* is erroneous insofar as it finds in *Windward* merely a desire on the part of the Supreme Court to avoid an implicit claim of Board jurisdiction over the internal order and discipline of a foreign vessel. As earlier discussed, the majority of the Court in *Windward* seemed to agree with the dissent there that it was expanding the exception beyond "the inescapable intrusion into the affairs of foreign ships that was present in *Benz* and *Incres*" to include, in the underscored words of the dissent, disruptions having an "*economic impact* upon foreign shipping." As I read the majority opinion in *Wind-*

ward, its dilation of the possible economic ramifications of the picketing miiltates against the First Circuit's characterization of *Windward* as reflecting nothing more than a reiteration of the pre-*Windward* doctrine which only attempted, as the *Windward* dissent put it, to preclude "Board cognizance of a dispute [which] will necessarily involve Board inquiry into the *labor relations* between foreign crews and foreign vessels . . .."

Initially, the First Circuit seemed to be concluding that the principal reason for distinguishing *Incres*, *Benz*, and *Windward* was that, as it happened, no foreign entities were as directly involved as they had been in those cases, and therefore no considerations of comity and accommodation in international trade obtained: "Here, an American union has ordered its members not to work for an American stevedore which had contracted to service an American ship carrying goods of an American importer, insofar as the work would involve handling goods originating in the Soviet Union. There is no question of interference in the affairs of a foreign employer." Thereafter, however, it becomes clear that the First Circuit was focussing on the absence of a primary "labor" dispute. The Court pointed out that the "primary dispute" before it was between the ILA and the U.S.S.R. over the military policy of the latter, and it "would be absurd to contend that application of the secondary boycott provisions would imply NLRB jurisdiction over *this* primary dispute, *i.e.*, over Soviet military policy" (emphasis in original).

The Court then went on, in the context of a discussion of the effect of the *Mobile* case, to conclude that *Windward* (and, *a fortiori*, *Mobile*) does not apply to the present facts because the "primary"

controversy here was not a "labor" dispute. It stated:

> We read *Mobile* as establishing that in the case of interrelated labor disputes, particularly disputes that give rise to similar conduct carried out at a single site, a "primary dispute" cannot be extricated from a "secondary dispute" for purposes of contrary jurisdictional findings.
>
> Here, however, there is no attempt to "bifurcate" the effects of a single union action. The *only* labor-related activity in issue has been played out by an all-American cast. The fact that this domestic dispute was inspired by military events in foreign lands—events far beyond NLRB jurisdiction—does not counsel against application of the NLRA to the labor dispute ongoing here at home. In sum, none of the considerations that prompted the Court in cases such as *Windward*, *Incres*, and *Benz* to find the Act inapplicable have force in this context. [Emphasis in original.]

In a subsequent footnote, responding to the dissenting opinion, the majority emphasized its conclusion that *Benz-Mobile* applies only where a "primary" "labor" dispute exists; since no such dispute could be found here, the problem of "bifurcation" presumably becomes irrelevant: "[W]e think those cases are adequately explained on the principle that in a case involving *intertwined* 'primary' and 'secondary' *labor* disputes, lack of Board jurisdiction over the primary dispute will preclude Board jurisdiction over the secondary conduct—more particularly where a contrary ruling might well suggest an improper interference by the United States in the

relationship between foreign employers and laborers" (emphasis in original).

If I am interpreting the majority opinion correctly, it did not rely on the *Grain Workers* cases previously described (although it discussed them) to conclude that the instant facts permitted separate consideration of secondary conduct; rather, it held that the *Benz-Windward* prong of the doctrine did not apply at all, since those cases require a threshold finding that the "primary" dispute is "labor"-related in order for any aspect of the dispute to even tentatively qualify for exemption from "commerce." It does seem that, were the primary controversy here a "labor" dispute, the majority might have held that any secondary character of the conduct was not separable ("We read *Mobile* as establishing that in the case of interrelated labor disputes, particularly disputes that give rise to similar conduct carried out at a single site, a 'primary dispute' cannot be extricated from a 'secondary dispute' for purposes of contrary jurisdictional findings.")

Senior Circuit Judge Aldrich dissented on this count. In his view, the *Benz* line "establishes the general proposition that the NLRA does not reach, directly or indirectly, labor controversies in which the 'primary' dispute relates to the internal affairs of a foreign entity (in those cases, foreign shipowners)." Judge Aldrich believed that the present "primary" dispute fell within that category, and, because of *Mobile*, he found no basis for coverage of the "secondary" aspects of the dispute: "[T]he internal management or affairs of foreign entities are none of the Board's business, directly or indirectly." [19]

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[19] Judge Aldrich, however, would have held actionable Allied's tort claim in admiralty based on the Union's asserted

2. The Meaning of *Mobile*.

As indicated above, I am inclined to agree with the Fifth Circuit (and Judge Aldrich) as to the general applicability of *Windward* to disputes of the present kind. Had Respondents simply engaged in picketing of Russian ships and cargoes, no further analysis would be required. But certain language in *Mobile* raises a question as to whether the form of action engaged in by Respondents—overt inducement of members not to work on Russian ships and cargoes for secondary employers, rather than primary picketing of such ships and cargoes—requires a different result.

Until *Mobile*, the problem of what activity did or did not affect "commerce" for jurisdictional purposes had been treated more or less as an abstract question —given the conduct and either its effect on principles and circumstances of international relationships (*Windward*) or the effect thereon resulting from Board inquiry into the conduct (*Benz* and the others), should the Board be denied authority to regulate (or to refuse to regulate) the conduct? The issue was not evaluated in conventional labor law terms of "primary" or "secondary" disputes or employers, or by examining the relationships between the parties involved in the situations.

In *Mobile*, however, the argument was made that

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wrongful interference with existing and prospective business relationships. The majority had held, under analogous Supreme Court precedent relating to the displacement by Section 303 of state law damage actions based on peaceful secondary picketing, that a claim in tort under federal common law also did not survive the enactment of Section 303. See *Local 20, Teamsters, Chauffeurs & Helpers Union* v. *Morton*, 377 U.S. 252.

the "commerce" analysis might be affected by the identity of the parties appearing in the state court, thus to some extent introducing labor law party concepts into the jurisdictional question. Given that state court jurisdiction is not preempted when the *foreign shipowner* sues the union for picketing, could that jurisdiction nonetheless be precluded by federal law when *the American stevedoring company* sues the union for interfering with its business by virtue of the same conduct, a conflict which might arguably fall within Section 8(b)(4) of the Act?

The *Mobile* majority said no, pointing out that since the response of the stevedore's employees to the picketing was a "crucial part of the mechanism by which the maritime operations of the foreign ships were to be affected," the "effect of the picketing on the operations of the stevedores and shippers, and thence on these maritime operations, is precisely the same" regardless of which party complains about it. "[A]ctivities" which "plainly were not" "commerce" in *Windward* do not become "commerce" simply because a stevedore or a shipper, rather than a shipowner, invokes the state court's jurisdiction. The majority rejected "the proposition that a secondary employer's domestic business activities may be the basis for Board jurisdiction where the primary dispute is beyond its *statutory* authority over unfair labor practices 'affecting commerce'" (emphasis in original). This approach seems to suggest that where the underlying controversy has *Benz* or *Windward* implications, secondary behavior connected with it also falls outside the Board's jurisdiction; if the Board cannot hear a complaint by a foreign shipowner, it also cannot hear a complaint by a stevedore arising from the dispute between the union and the shipowner.

Nonetheless, the Court seemed to preserve the viability of the *Grain Workers* cases, citing them in a footnote and saying that its ruling in *Mobile* "cast no doubt on those cases which hold that the Board has jurisdiction under § 8(b)(4) of domestic secondary activities which are in commerce, even though the primary employer is outside the United States." It is argued that this apparent approval defines and limits *Mobile*, marking out the boundaries of certain "secondary" conduct as to which the Board, post-*Mobile*, retains jurisdiction. As previously described, in the *Grain Workers* cases, a Canadian union was engaged in a dispute with Upper Lakes, a Canadian shipping company. To support the Canadian union, an American union induced its members, employees of Continental Grain, an American company, not to load Continental's grain on Upper Lakes' ships while the latter were in Chicago to take on grain at Continental's elevator. The Board, the Seventh Circuit, and the District of Columbia Circuit all agreed that the American union's conduct was in "commerce," not governed by *Benz et alia*, and violative of Section 8(b)(4).

What sort of conduct, if any, was the *Mobile* Court saving for Board jurisdiction "even though the primary employer is located outside the United States?" Putting aside the *Grain Workers* footnote, and examining only the body of *Mobile*, the text seems to suggest a comprehensive, rather than a narrow, ban on assertion of Board jurisdiction over secondary conduct related to a primary *Windward* dispute.

It could, perhaps, be argued that the square holding in *Mobile* is limited to its known facts; that the Court was saying nothing more than that "primary" picketing always subsumes an intention to embroil

secondary employers, and since the latter are inherently victimized by the "primary" picketing, and since that picketing has been held to have certain consequences which place it beyond the Board's jurisdiction, to allow the Board an opportunity to examine into the conduct would possibly permit it to inquire into "activities" already adjudged not to be in "commerce."

It could also, and perhaps more persuasively, be argued that the Court was holding that *any* secondary conduct related to the picketing was beyond the Board's jurisdiction; that is the implication of the broad statement that "Here, neither the farmer seeking to ship his soybeans, the stevedores who contracted to unload the cargo of the foreign-flag vessel, nor the longshoremen whom the stevedores employed to carry out this undertaking, were for these purposes engaged in or affecting commerce within the purview of the National Labor Relations Act. Therefore the petitioners' picketing did not even arguably violate § 8(b)(4) of the Act." 419 U.S. at 228.

It is contended, however, that the *Grain Workers* cases noted with apparent approval by the Court authorize Board jurisdiction here because, as in those cases, an American union has induced employees of American companies to withdraw their services from their employers in order to affect foreign employers. The proffered distinction is that where the union's action is *first* directed against the American employer, by inducement of his employees, the conduct is in "commerce," as in the *Grain Workers* cases, whereas when the union, impelled by the same motivation, directly engages in picketing of the foreign employer, with the underlying purpose of inducing its members who work for a secondary employer to

refuse to work, that conduct is not in "commerce," as in *Mobile*. This seems to be the alternative line of argument advanced here by the General Counsel:

> Put another way, when a domestic union's conduct is directed immediately at a foreign person whose operations involve activities both within and outside of domestic "commerce," the inquiry as to whether the conduct is "in" or "affecting commerce" for the purposes of the Act necessarily focuses on the question whether the object of the union's conduct is to affect the domestic commercial activities of the foreign entity, as in *Ariadne*, or to affect its operations extending beyond domestic commerce, as in *Windward-Mobile*. If the former, the Board has jurisdiction; if the latter, the Board's jurisdiction does not lie. However, where, as in *Grain Workers* and in the instant cases, a domestic union's conduct is immediately directed at a domestic person whose operations are indisputably in commerce, that conduct is also "in commerce," regardless of whether the union's ultimate object is to indirectly influence the non-domestic commerce activities of a foreign entity.[20]

General Counsel thus asserts that, even when conduct might ordinarily appear to be *Windward*-ex-

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[20] Earlier in his brief, General Counsel had taken the position that *Windward* applies only to union action "designed to . . . directly affect the labor relations of foreign vessels vis-a-vis their foreign crews or otherwise intrude into the maritime operations of foreign-flag ships," and was thus "inapposite to the instant proceedings." The argument quoted above is made on the *arguendo* assumption that *Windward* may also apply to "jurisdictional issues extending beyond the confines of maritime operations of foreign-flag ships."

cluded from Board jurisdiction, where that conduct is "immediately directed" at a domestic person, the *Grain Workers* cases apply without further consideration of the object of the conduct.[21]

But since *Windward* seems to hold that the question of Board-or-state jurisdiction over certain activity may be determined by an assessment of the impact of the activity itself upon foreign trade, does it make sense, for purposes of determining whether the "activity" is in "commerce" or not, to make the answer turn upon the identity of the party "first" affected by the activity? *Mobile*, and the implication of General Counsel's argument earlier quoted, stand for the proposition that had the ILA authorized the use of pickets in the various ports, picketing the Russian ships or cargo as they attempted to leave or arrive, any concurrent secondary motivation for the activities, no matter how blatant, would be outside

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[21] I have some trouble with this analysis, aside from that set out above, *infra*. For one thing, as we have seen, the *Windward* majority spoke not simply of the union's "object" but also of the foreseeable reverberating effects on the foreign entity and other parts of the trade community, including the United States. For another, the contention that, in the present case, the conduct is "immediately directed" against a "domestic person" rests on the notion that the Respondent International's order to withhold labor has its first impact upon the domestic secondary employers. As the Court pointed out in *Mobile*, however, that same impact characterized that situation: "[T]he response of the employees of the American stevedores was a crucial part of the mechanism by which the maritime operations of the foreign ships were to be affected." 419 U.S. at 224. It may be said that the order here was not any more "immediately directed" at the stevedores than the picketing in *Mobile*, which was designed, as the Court said, to influence their employees to refuse to work.

the Board's reach.[22] If that is the correct proposition, I find it difficult to believe that the Court intended to create such a tenuous distinction—that, in deciding the jurisdiction of the Board over two forms of union activity having the identical impact on foreign trade, it is improper for the Board to assert such jurisdiction when the impact is caused by union picketing of a foreign ship accompanied by the most unmistakable evidence that the picketing has a secondary objective, but it is not improper for the Board to assert jurisdiction when the union omits the picketing and simply engages in secondary conduct. The result of such a rule would be that if the Union wished to opt for state rather than Board jurisdiction during the next Afghanistan, it would order picketing rather than issue a press release (and then, if it desired, within the confines of that picketing, engage in open and notorious secondary conduct).

While it seems unlikely to me that the Court would have attached meaningful weight to such a distinction, the *Grain Workers* footnote in *Mobile* cannot be ignored. The Fifth Circuit in *Baldovin, supra*, 626 F.2d at 453, n. 5, thought that the *Grain Workers* cases were distinguishable from the present situation, but felt that no "bright line can be drawn between them" and the instant boycott, and in *Allied International, Inc., supra*, Judge Aldrich said in dissent that despite the Supreme Court's indication that its holding in *Mobile* "need cast no doubt on" the *Grain*

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[22] Such as, e.g., picketing having a demonstrable purpose of inducing longshoremen not merely to honor a picket line, but "to engage in concerted conduct against their employer to force him to refuse to deal with the struck employer," *Local 761, International Union of Electrical, Radio & Machine Workers, AFL-CIO* v. *NLRB*, 366 U.S. 667, 673-674.

Workers cases, "[t]o [his] mind, *Mobile* casts considerable doubt on them." [23]

It may be that the *Mobile* Court saw the following difference between the cases. In the *Grain Workers* cases, a "primary" dispute existed between the Canadian employer and the Canadian union prior to the American union's decision to take action. In one of the *Grain Workers* cases, 376 F.2d 774, 776, the D.C. Circuit said that the "short answer" to the *Incres* contention there made by the union "is that the Board is not here exercising jurisdiction over the

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[23] The Fifth Circuit essayed the following distinctions between *Mobile* and the *Grain Workers* cases:

> The American union's objective was to prevent the American employer from doing business with the Canadian shipper and thus to embroil the American employer in the foreign labor dispute. The objective was to influence action in the United States, not abroad. The union activity was designed to affect directly the American employees in their relationship with their American employer, thus bringing the *Grain Elevator* cases more closely in line with *Ariadne*, where the Act was applicable, than with *Windward*, where the Act was inapplicable. While we think that the *Grain Elevator* cases are distinguishable from the present cases, the distinction is solely one of degree and we cannot say that a bright line can be drawn between them and the present cases.

In *Allied International, supra*, the First Circuit discussed the *Grain Workers* cases, but did not seem to rely heavily on them or on any purported dissimilarity between picketing and a "hot cargo" order; as described above, the Court thought *Mobile* applied to oust Board jurisdiction of secondary conduct only where the Board has no jurisdiction of the primary dispute "in a case involving *intertwined* 'primary' and 'secondary' *labor* disputes" (emphasis in original), which is not the present case. The Court thus did not reach the *Mobile* issue.

Canadian primary dispute, but over secondary activity in this country . . .." It may be that the *Mobile* majority felt that secondary American conduct relating to an extant and active controversy between foreign disputants could not have the same potential for disruption of foreign commerce as might be engendered by a freshly-created direct dispute between an American union and a foreign entity.

I merely speculate; the Court did not indicate that its footnote was based on such a theory. It should be kept in mind, in appraising this footnote and its meaning, that the *Grain Workers* reference was, after all, *obiter dictum*; since the allusion to those cases was unnecessary to the decision, it cannot be regarded as a thoroughly considered definition of the dimensions of *Mobile*. For the reasons previously given, I am inclined to conclude that (1) the *Grain Workers* cases were thought by the Court to be applicable only to an ongoing foreign primary dispute, on the reasoning suggested above, or (2) the footnote approval of those cases does not represent a mature consideration of their implications, as previously discussed.

3. The Relevant Board Cases.

Two cases decided by the Board bear out the present issue.

Respondent ILA has engaged in boycotts for "political" purposes before, and in *Local 1355, International Longshoremen's Association (Ocean Shipping Service, Ltd.)*, 146 NLRB 723, the Board was confronted with the first of these. On that occasion, in 1962, ILA issued a press release setting out the steps it was taking to eliminate trade with Cuba, including a determination not to "load or unload cargo of any

nature in ships of any owner whose vessels are used in trade with Cuba." An ILA local accordingly refused to refer employees to a Maryland stevedore to fit the Tulse Hill, a blacklisted foreign ship manned by foreign nationals.

In holding that the respondent unions had violated Section 8(b)(4) as charged, the Board made a footnote rejection of the respendents' contention that the Board was without jurisdiction because "the Tulse Hill is a foreign-flag vessel manned by an alien crew.' The Board, citing *Incres* and other cases, stated (146 NLRB at 724, n. 3), "As the instant proceeding involves no issue bearing upon labor relations aboard the Tulse Hill, its registry and the composition of the vessel's crew are immaterial in determining the Board's power to entertain Ocean's unfair labor practice charges against Respondents." [24]

I do not view the Board's evaluation in *Ocean Shipping* of its jurisdictional authority as necessarily binding upon me. That case was decided in 1964, and while the Board accurately reflected the reach of *Benz-Incres* at that time, it may fairly be said that *Windward* and *Mobile*, handed down 1974, represent

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[24] On review, a panel of the Fourth Circuit, Judge Bryan dissenting, reversed the Board's finding of violation on the ground that the Board has no jurisdiction over controversies which are not "labor disputes" as defined in Section 2(9) of the Act. The panel majority also went on to hold that Section 8(b)(4) was inapplicable to the dispute for other reasons. 332 F.2d 992. Soon thereafter, the Board expressed disagreement with the Fourth Circuit's holding that a "labor dispute" is a prerequisite to Board jurisdiction under Section 8(b)(4), *National Maritime Union of America (Weyerhaeuser Lines)*, 147 NLRB 1317, and, since then, several courts have indicated disapproval of the Fourth Circuit's position, e.g., *National Maritime Union of America* v. *NLRB*, 346 F.2d 411, 415 (C.A.D.C.).

an extension of the doctrine, beyond the "labor relations" of a foreign vessel, which renders *Ocean Shipping* obsolete to that extent.[25]

A recent Board decision, on the other hand, must be deemed a more timely assessment of current Supreme Court authority. In *National Maritime Union of America (Shippers Stevedoring Company), supra,* 245 NLRB No. 29, decided in 1979, the claim was successfully advanced by the respondent union that *Windward-Mobile* displaced Board jurisdiction of the dispute. There, a union which represented American seamen picketed, in the port of Houston, a Russian-owned vessel carrying a cargo of German-built automobiles. The underlying grievance was ostensibly that the carriage of such cargo by the Russian ship violated a United States law requiring that half of all cargo funded by a United States government agency be transported in American-flag vessels.[26] Picket signs protested "Sending U.S.A. Tax Dollars to Support U.S.S.R. Merchant Fleet." ILA longshore employees requested by the charging party stevedoring company did not report for work during the picketing. The General Counsel issued complaint under Section 8(b)(4)(i)(ii)(B). The union argued that the Board was without jurisdiction.

After liberally quoting *Windward* and *Mobile*, the Administrative Law Judge held concisely:

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[25] The same staleness consideration applies to the Board's assertion of jurisdiction in one of the *Grain Workers* cases, decided in 1965. *Grain Elevator, Flour and Feed Mill Workers, International Longshoremen Association, Local 418, AFL-CIO (Continental Grain Company)*, 155 NLRB 402, 403, n. 6.

[26] Other evidence, however, suggests that the union was more generally attacking the use of foreign vessels to transport American-purchased cargo.

The General Counsel argues that since the picketing in the instant case was not directed at the employer-employee relationship of the Skulptor Golubkina, the Supreme Court's opinions in *Windward* and *Mobile* are not dispositive of the issues in this case. I disagree.

The Court in *Windward* set forth in effect that virtually none of the predictable responses of a foreign shipowner to picketing of the *Windward* type would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate. The facts in the instant case warrant, in my opinion, even more so such a conclusion and, similar to the Court's opinions in the *Windward* and *Mobile* cases, that the picketing of the Skulptor Golubkina was not "in commerce" as defined by the Act.

Thus, I find it clear that the picketing activities of the Union directed to the foreign-flag ship, Skulptor Golubkina, was not picketing "in commerce" within the meaning of the LMRA. The *Mobile* case reveals that a bifurcated view of such "commerce" was not permitted as regards employers, employees, or persons loading or unloading such commerce, and that such picketing activities as regards such employers, employees, or persons were not covered by the Act.

In adopting the recommendation of the Administrative Law Judge to dismiss the complaint, the Board indicated no reservations about his rationale or result.

It should be noted that in rejecting the General Counsel's contention that *Windward* and *Mobile* were not controlling because the picketing was "not directed at the employer-employee relationship"

aboard the vessel, the Administrative Law Judge did so by relying on that portion of *Windward* which adverted to the determination that "none of the predictable responses of a foreign shipowner to picketing of the *Windward* type would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate." The Charging Parties in *Kansas Farm Bureau, et al.* vigorously attack this analysis as an unwarranted truncation of the more comprehensive *ratio decidendi* set forth in the *Windward* case.[27] I must say that in the context of *Shippers Stevedoring*, I am not sure what one might consider to be the projected "predictable responses" of the Russian government, which owned the vessel; the evidence makes it clear, in my view, that the protest was really directed at the United States Department of Transportation.[28] Nonetheless, the ultimate objective of the picketing was to affect the choice of vessels used to transport American goods, and thus to influence adversely the future operations of many foreign vessels in the American trade (including, but not limited to, the Russian vessel involved in the case).

If I were to conclude that the Board, in *Shippers Stevedoring*, has approved a test under which jurisdiction is measured by the single question of whether or not the predictable responses of a foreign entity

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[27] On the other hand, the Charging Party in *Occidental Chemical Company* believes that the Administrative Law Judge in *Shippers Stevedoring* "correctly thought this fact important because it illustrated why, under the particular circumstances of the case, the test for Board jurisdiction, absence of conflict with foreign labor and maritime laws or policies, was *not* satisfied" (emphasis in original).

[28] See *Shippers Stevedoring*, ALJD pp. 5, 7, 8.

to a union's antagonistic conduct might extend beyond the kind of "wage-cost decision benefiting American working men which the LMRA was designed to regulate," I would have to say, as to the present cases, that the predictable responses here plainly would so exceed that kind of decision, and hence the Board would be without jurisdiction (unless *Mobile* permits jurisdiction because of the nature of the present conduct). If I were to assume that the Board *sub silentio* applied a broader test, assaying, as the Court seemed to do in *Windward*, the substantiality of the international ramifications of the conduct, it would follow that the Board thought that the picketing, which ultimately sought a reduction of unspecified foreign vessels used to transport American cargo, portended the sort of consequences which brings union conduct within the *Windward* exemption.[29] Either analysis, it seems to me, tends to argue for also finding absence of jurisdiction in the present case (prescinding, again, the *Mobile-Grain Workers* issue, to which I now turn).

The net result of *Shippers Stevedoring* was to hold that the Board could not "bifurcate" the case and find Section 8(b)(4)(i)(ii)(B) applicable, regardless of the assertedly unlawful conduct in which the union had engaged. Although the General Counsel had attempted to establish a separable objective of

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[29] The *Kansas Farm Bureau et al.* Charging Parties suggest that *Shippers Stevedoring* was an ill-considered decision, probably because released in the well-known end-of-the-fiscal-year "flurry" of Board decisions. I note, however, that the Board did not adopt the Administrative Law Judge's decision until some 8 months after its issuance, an unusual delay which arguably indicates that the Board paid careful attention to the problem. As I read Occidental's brief, it finds no fault with the result in *Shippers Stevedoring*.

ensnarement of the longshoremen scheduled to unload the vessel, the Administrative Law Judge refused to consider or analyze the evidence pertinent to this contention, despite his conclusion that the sole objective of the picketing was secondary in nature.[30] In doing so, he seemed to be holding that whether or not a separable secondary violation might be found within the confines of "the picketing activities of the Union," any such conduct would be too enmeshed with the activity already determined to be not in "commerce" to permit independent consideration and adjudication. The complaint was thus dismissed without any examination into the possibility of a distinct unfair labor practice being contained within the general boundaries of the primary picketing.[31]

In my view, *Shippers Stevedoring* goes a long way toward dictating a like result in the present cases.

4. The Positions of the Parties.

Perhaps indicative of the anfractuous character of the present issue are the positions enunciated by the General Counsel and the Charging Parties in each case. As I read their analysis, and I hope that

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[30] The Administrative Law Judge found that "the only objective in the picketing was to cause employers or employees who were involved in or were assigned to or were unloading the Skulptor Golubkina to cease doing so."

[31] In *Baldovin, supra*, as set out previously, the Fifth Circuit accorded great weight to *Shippers Stevedoring*, construing it to "adopt [ ] as the touchstone for determining whether a particular activity affects commerce the foreignness of the objective of those engaged in the activity and the degree of intrusion into the affairs of the foreign entity which will be brought about by the entity's response to the activity in question."

I do not misrepresent them, none of the proponents of the violations charged quite agrees with any other about the apropriate rationale for finding the existence of Board jurisdiction here.

I have earlier discused General Counsel's interpretations of *Windward* and *Mobile*. The brief submitted by the Charging Parties in *Kansas Farm Bureau et al.* would limit *Windward-Mobile* to conduct relating to union "interference with the maritime operations of foreign vessels" and no more; since, these Charging Parties contend, Respondents have not "taken any steps, including picketing, designed to affect foreign maritime operations," and such interference "is neither an object of the union's conduct here nor an essential part of the mechanism through which the union intends to achieve its objectives," the Supreme Court cases do not apply. I am unable to agree with this contention.

Perhaps the argument is more esoteric than I recognize, or perhaps it is an effort to hold the union to its claim that it had no desire to interfere with anyone's business, but I cannot find any basis for the assertion that President Gleason's order did not intend to interfere with, *inter alia*, the maritime operations of foreign vessels. Elsewhere, these Charging Parties state that the Board has "recognized that the secondary effects of a political boycott are necessarily the *heart* of such union conduct" (citing *Local 1355, International Longshoremen's Association (Ocean Shipping Service, Ltd.)*, *supra*), and it seems clear that imputing such secondary intentions to the Union cannot be done without also imputing an intention to have an impact upon foreign trade.

The brief for the Charging Party in *Occidental* summarizes:

> [In *Windward* and *Mobile*,] [t]he one respect in which the Court extended the earlier decisions was in broadening the area in which principles of comity would come into play. As the *Windward* Court observed, "[t]he picketing activities in this case do not involve the inescapable intrusion into the affairs of foreign ships that was present in *Benz* and *Incres*." 415 U.S. at 113. Instead of excluding from the Board's jurisdiction only those cases in which there was an "inescapable" conflict with the labor and maritime laws and policies of a foreign government, Congress, the Court concluded, also intended to exclude from the Board's jurisdiction those disputes in which conflict with foreign labor and maritime laws and policies was merely likely. An increased sensitivity to the need to avoid conflict with foreign labor and maritime laws and policies clearly does not indicate that the Court abandoned its view that the presence of such conflicts was the touchstone for determining the jurisdiction of the Board. (Footnote omitted.)

The problem with this formulation is the assertion that after *Windward*, the litmus test was still limited to the existence of "conflict with the labor and maritime laws and policies of a foreign government." My reading of *Windward*, consistent with Justice Brennan's, is that the Court moved beyond the possibility of that kind of conflict and incorporated, as well, the possibility of substantial adverse economic impact on a foreign party and foreign trade.

Finally, Allied International, Inc., argues:

> Allied reads the essence of *Windward* and *Mobile Steamship* as being that considerations of comity

demand that union action that has the intent including foreseeable consequences of requiring a foreign entity to make a significant management decision be deemed to be not "in commerce" within the meaning of the NLRA . . .. In short, the Board loses jurisdiction only because it is foreseeable that the union's conduct can achieve its intended effect of significantly and directly affecting a foreign management decision. If it is foreseeable that the Union's conduct will be totally ineffective in achieving its foreign objective then there is no underlying comity interest to be served by withholding NLRB jurisdiction . . .. No reasonable person could possibly believe that the ILA's boycott will foreseeably have the slightest chance of forcing Russia to abandon its invasion of Afghanistan . . .. If the test for whether the Board does or does not have jurisdiction is to be the foreseeable effects of the union's conduct upon foreign nations or nationals as compared to Americans, then it becomes not at all "anomalous" that in some situations the Board would have jurisdiction when the primary dispute was not a labor dispute but would not have it in other situations when the primary dispute was a labor dispute. See *Baldovin* supra p. 2554 of 105 LRRM. The question of whether or not the primary dispute is a labor dispute has absolutely nothing to do with the fundamental principles of comity and accommodation in international trade upon which *Windward* and *Mobile Steamship* are predicated. By the way of contrast, the foreseeable results or lack thereof of the union's conduct upon foreign governments and foreign nationals has everything to do with

those fundamental principles of comity and accommodation.

Allied thus accepts that the *Windward* principle may apply where "foreign governments and foreign nationals," not simply foreign shipowners, are affected by union conduct. Further, it recognizes that *Windward* addressed the foreseeable consequences of domestic union conduct upon foreign enterprises. It errs, I think, in saying that *Windward* applies only where the union's ultimate objective is capable of achievement. *Windward's* analysis concerned itself with the effect of picketing activities which "directly affect" foreign maritime operations. There is no reason to believe that the "commerce" question should rise or fall on the issue of whether the union will be eventually gratified in its ultimate goal. When an immediate *Windward* impact is threatened against a foreign employer, there would seem to be as much of an "underlying comity interest to be served" by withholding Board jurisdiction as there was in *Windward*, regardless of the unlikelihood of union success in attaining its final objective.

Finally, Respondents argue that what is determinative on the "commerce" question is "the character of the dispute," and that when the dispute is about a "foreign government's invasion of a remote nation, it is . . . emphatically not" in "commerce." This argument does not, it seems to me, track with total fidelity the *Windward* decision, which engaged in a detailed speculative investigation of the economic consequences of the union's conduct there, examining the "predictable responses" of the employer and weighing, as well, the absence of benefit to American workingmen from that conduct.

Concluding Discussion

It is my obligation, of course, to apply the law consistently with the guidance provided by the Supreme Court and the Board. As I understand that guidance in the light of the *Windward* gloss on *Benz*, and the *Shippers Stevedoring* gloss on *Windward*, union conduct which is intended to disrupt foreign commerce and its instrumentalities, and which has the real capability of disrupting such commerce to a meaningful extent and beyond any immediate domestic benefits which could accrue to American workers, is not within the reach of Board jurisdiction, but rather is exclusively subject to state laws.[32] In the present cases, it was clearly the purpose of Respondents to significantly subvert the foreign trade engaged in by the Soviet Union, and the Union conduct to that end threatened the sort of ramifying consequences, affecting the Russian economy, without countervailing and limited benefit to domestic workers, to which *Windward* referred. Accordingly, *Windward* and *Shippers Stevedoring* both apply, unless the *Grain Workers citations* by the *Mobile* Court argue to the contrary.

In my view, the approval in *dicta* of those case was either confined to their particular facts, distinguish-

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[32] The logic of *Windward*, I think, compels a conclusion that the doctrine is not confined to conduct affecting "the maritime operations of foreign ships," but extends to foreign commerce in general. If, as here, a union intends to affect, *inter alia*, the operations of a foreign purveyor and purchaser of goods, the same sort of spiral of economic consequences is entailed as that envisioned by the *Windward* Court. I further note that *Windward* described *Benz* as demonstrating a reluctance by the Court to intrude domestic law into the complexities affecting "foreign trade." 415 U.S. at 110.

able from the present situation, or cannot be construed as a considered disposition of the issue. I do not believe that the Supreme Court, *in determining whether Board or state law should apply to union activities*, would hold that the Board may assert jurisdiction when, as here, the union orders its members not to work for secondary employers, even though, under *Mobile*, the Board would be without jurisdiction if the union simply chose to accomplish the identical end by picketing, including the sort of picketing which the Board might otherwise consider to constitute a violation of Section 8(b)(4). There is no reason to believe that the Court would, *for purposes of assigning jurisdiction*, attach any weight to such a nebulous and controllable distinction. And further, as discussed, it appears to me that *Shippers Stevedoring* holds that if the "primary" dispute falls within *Windward*, separable secondary conduct in support of it falls within *Mobile*.

I shall, accordingly, recommend dismissal of the complaints in all three cases. The special facts in *Allied International* do not, I think, warrant separate treatment. No foreign vessels or crews were, it is true, involved in the *Allied* case; but the targeted Russian cargo sufficiently embroils a foreign government so as to bring the *Allied* situation within the reach of *Windward*.

As noted long ago, I cannot discern any great practical significance, from the point of view of the nongovernment parties, in whatever result is reached in these particular cases. As far as I can see, if the Labor Board is not available to the Charging Parties, the state courts then become the forum to which they turn. I am, I must say, rather puzzled as to why the Charging Parties have championed with such vigor

the Board's exclusive jurisdiction over this subject matter, and equally puzzled why the Respondents have so fiercely resisted that jurisdiction. It would appear that secondary employers might prefer, in this area, as much access to the state courts as possible, since not only do state laws seem to be less protective of unions engaged in this sort of activity,[33] but also the employers invoking state laws are entitled to do so without having to convince a public prosecutor. Undoubtedly, however, the parties all have good reasons for the postures they have taken in this litigation.[34]

Having concluded that the Board is without jurisdiction, I need not dwell on the further issues presented. I would say, however, after preliminary consideration, that it is probable that the Board would find the principal violations alleged and that the First Amendment claims advanced by Respondents are not well-taken. Recognizing that some higher authority might disagree with my conclusion on the jurisdictional issue, I have made, I believe, all factual and inferential findings which would be necessary or useful in further processing of the cases.

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[33] While the Supreme Court held in *Local 20, Teamsters Union* v. *Morton, supra*, 377 U.S. 252, that state laws awarding damages against peaceful secondary picketing are supplanted by Section 303 of the Act, states would presumably be allowed *pro tanto* to award damages under their laws whenever it is held that union conduct is not "activity affecting commerce," a prerequisite to the application of Section 303.

[34] It also appears that arbitral relief may be available in such a situation. In Houston, in February 1980, an arbitrator found that the boycott violated the no-strike provision of the bargaining agreement, and ordered the two ILA locals and the District to desist from participating in it.

Conclusions of Law

1. Respondents are labor organizations within the meaning of Section 2(5) of the Act.

2. The activities complained of herein are not in "commerce" within the meaning of the Act, and the complaint must therefore be dismissed for want of jurisdiction.

Upon the foregoing findings of fact and conclusions of law, I issue the following recommended: [35]

ORDER

The complaint is hereby dismissed.

Dated: Washigton, D.C. March 16, 1981

/s/ Bernard Ries
BERNARD RIES
Administrative Law Judge

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[35] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

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No. 80-1663

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, and T. W. GLEASON, Individually and as he is President of International Longshoremen's Association, AFL-CIO, and H. R. HASSELGREN, Individually and as he is Secretary-Treasurer of International Longshoremen's Association, AFL-CIO and N. J. BOWERS, Individually and as he is Executive Vice President of International Longshoremen's Association, AFL-CIO and F. R. FIELD, JR., Individually and as he is General Organizer of International Longshoremen's Association, AFL-CIO and A. SCOTTO, Individually and as he is Regional Director of International Longshoremen's Association, AFL-CIO and J. T. MOOCK, Individually and as he is First Vice President of International Longshoremen's Association, AFL-CIO and R. A. MASSEY, Individually and as he is Second Vice President of International Longshoremen's Association, AFL-CIO and G. W. DIXON, Individually and as he is Third Vice President of International Longshoremen's Association, AFL-CIO and W. P. LYNCH, Individually and as he is Fourth Vice President of International Longshoremen's Association, AFL-CIO,

Petitioners,

v.

ALLIED INTERNATIONAL, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

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Questions Presented

1. Whether the domestic effects of a union's refusal to handle Russian goods, undertaken to protest Soviet military aggression, are "in commerce" so as to be within the purview of the Labor Management Relations Act (LMRA)?

2. Whether longshoremen's refusal to perform services may be the basis for an action under LMRA § 303, 29 U.S.C. § 187, alleging a violation of the secondary boycott proscriptions of LMRA § 8(b)(4), 29 U.S.C. § 158(b)(4), where

   (a) any unlawful object must be inferred exclusively from the effects of the conduct which are not separable from its admitted noneconomic purpose;

   (b) the union activity is not motivated by a primary labor dispute;

   (c) no labor dispute is involved except a controversy with the union's employers over the scope of their collective bargaining agreement;

   (d) the claims of any third party sound in tortious interference with contract, which is cognizable under state law?

3. Whether the action of a union which supports and endorses the desire of its members to refrain from participation in morally repugnant work and to protest aggression is protected by the First Amendment from restraint by the application of the LMRA and from interference by a government agency?

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IN THE

Supreme Court of the United States

October Term, 1981

No. 80-1663

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*,

Petitioners,

v.

ALLIED INTERNATIONAL, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR PETITIONERS

Opinions Below

The opinion of the court of appeals is reported at 640 F.2d 1368 (1st Cir. 1981) and is reproduced as Appendix A to the petition herein. 1a *et seq.*[1] The judgment of the court of appeals is reproduced at J.A. at 22a *et seq.* The opinion of the United States District Court for the District of Massachusetts is reported at 492 F. Supp. 334 (D. Mass. 1980) and is reproduced at 99a *et seq.*

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[1] References to the Appendices to the Petition for a Writ of Certiorari herein are designated: "—a"; to the Joint Appendix: "J.A. at —"; and to the appendix to the Supplemental Memorandum for the United States as Amicus Curiae: "S.M. at —."

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The judgment of the court of appeals was entered January 6, 1981. The petition herein was filed on April 3, 1981 and granted on October 5, 1981.

Constitutional Provision Involved

The First Amendment to the Constituion of the United States provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Statutory Provisions Involved

The relevant statutory provisions are §8(b)(4) of the Labor Management Relations Act, 29 U.S.C. §158(b)(4); and §303 of the Labor Management Relations Act, 29 U.S.C. §187. The pertinent parts of these statutes are reproduced in the petition for certiorari at pp. 2-3.

Statement of the Case

Proceedings Below

This case arises on petitioners' motion pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss the complaint for failure to state a claim upon which relief can be granted. The district court granted the motion. 108a. The court of appeals by a divided panel affirmed dismissal of respondent's antitrust and admiralty tort counts but reversed as to respondent's count under Labor Management Relations Act (LMRA)

§303, 29 U.S.C. §187, for damages by reason of a secondary boycott.[2]

Statement of Facts

This case is one of several arising from the refusal of members of Petitioner International Longshoremen's Association, AFL-CIO, (ILA) to handle goods bound to or from the U.S.S.R. or carried on Russian ships on account of the Soviet invasion of Afghanistan.[3] The ILA action was taken in "response to the overwhelming demands of the rank and file members," 640 F.2d at 1369, n.2, 3a, n.2, and was consistent with patriotic positions taken by the union in the past. J.A. at 57a-62a. It did not include ILA locals in Canada. J.A. at 61a. As the Fifth Circuit found in a related case:

> The ILA's objective in the instant case is to voice a political protest against the U.S.S.R. by refusing to handle cargo bound for that country. It has taken no steps to broaden that specific and limited objective. The parties have stipulated that the union has not refused to refer its members to the stevedoring companies to provide services for other cargoes. Even where the American entities have diverted ships from ports where the ILA work stoppage is effective to ports where it has been enjoined, the union has not struck those

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[2] On May 5, 1981, respondent cross-petitioned this Court for a writ of certiorari to review the First Circuit's dismissal of the antitrust and tort counts. (No. 1906). The Court has not granted the cross-petition. The instant proceeding is limited to the issues raised by the court of appeals' sustaining of the LMRA §303 count.

[3] One of these cases, *Jacksonville Bulk Terminals, Inc.* v. *International Longshoremen's Ass'n, ("JBT")* is pending before this Court, No. 80-1045. The order granting the writ herein set the case "for oral argument in tandem with No. 80-1045." Consequently, this brief will assume that the Court is generally familiar with the background of the ILA/Soviet action and the ensuing litigation, which is fully catalogued in Respondents' Brief in *JBT* p. 3, n.3.

entities' non-Soviet operations despite the fact that such American entities are clearly doing business with the Russians and avoiding the ILA work stoppage.

Baldovin v. *International Longshoremen's Association*, 626 F.2d 445, 452 (5th Cir. 1980). *See also* the First Circuit's decision in this case, 640 F.2d at 1380, 26a; *Walsh* v. *International Longshoremen's Association*, 488 F. Supp. 524, 530-31 (D. Mass. 1980), *vacated and remanded with instructions to dismiss on grounds of res judicata*, 630 F.2d 684 (1st Cir. 1980).

This case arose when longshoremen in the port of Boston refused to handle Soviet goods.[4] Respondent Allied International, Inc. (Allied) imports wood products from the Soviet Union, 640 F.2d at 1369, 2a; J.A. at 9a, both on Russian ships, J.A. at 39a, and by Waterman Steamship Lines (Waterman) J.A. at 9a, an American carrier which utilizes the stevedoring services of John T. Clark & Son of Boston, Inc. (Clark). J.A. at 35a. Clark employs longshoremen pursuant to a collective bargaining agreement with petitioners ILA and Local 799, 640 F.2d at 1369, 2a, which contains a broad no-strike clause and provides that employers may utilize non-ILA labor if the union "is not able or does not supply" labor. S.M. at 5a.

The immediate events which precipitated this litigation are set forth in the court of appeals' opinion. 640 F.2d at 1369-70, 2a-4a. The ILA refused to handle Russian cargo destined for Allied in the port of Boston, other than to complete unloading a Waterman ship already at berth. 640 F.2d at 1370, 3a; J.A. at 12a and 52a. As far as the ILA was concerned, Allied and Clark were free to unload

[4] The same events gave rise to *Walsh* and to a secondary boycott proceeding before the National Labor Relations Board. *International Longshoremen's Ass'n (Allied Int'l Inc.)*, 257 NLRB No. 151 (1981). The Board's decision is reproduced at S.M. 1a *et seq.* The decision of its administrative law judge is reproduced at 38a *et seq.* and at S.M. 43a *et seq.*

the Russian cargo by nonunion personnel. J.A. at 62a-63a; 106a-107a; Transcript of hearing before the district court at 32-34, 40, 43-45. Rather than pressing Clark to seek non-ILA labor, Waterman and Allied diverted another ship and unloaded the cargo in Montreal. 640 F.2d at 1370, 3a; J.A. at 37a. Additionally, Waterman repudiated its agreement to transport Allied's wood products aboard a third vessel. 640 F.2d at 1370, 3a; J.A. at 38a. Two vessels of U.S.S.R. registry, the "S. Kovalev" and the "S. Borudulin", scheduled to carry wood for Allied to Boston in April or early May 1980, J.A. at 39a, failed to make an appearance, presumably due to the ILA refusal.

Allied instituted the present action under LMRA §303 and filed charges with the National Labor Relations Board (NLRB), alleging in both that the ILA's conduct violates LMRA §8(b)(4), 29 U.S.C. §158(b)(4).[5]

Summary of Argument

This Court has consistently held that, absent an express mandate from Congress, union activity in a dispute with a foreign entity over foreign matters is not in commerce so as to be subject to the jurisdiction of the LMRA or the NLRB. Under the principles enunciated in *Windward Shipping* v. *American Radio Association*, 415 U.S. 104 (1974), petitioners' dispute with the Soviet Union over the invasion of Afghanistan is not in commerce. The object of the union's activity and the foreign entity's predictable responses are farther removed from the areas the Act was designed to regulate than in any of the situations previously excluded by this Court.

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[5] A violation of LMRA §8(b)(4) provides the basis for an unfair labor practice proceeding before the NLRB under LMRA §10, 29 U.S.C. §160, and a private action under LMRA §303.

Once the original dispute is recognized not to be in commerce, the domestic effects of the union's conduct cannot, under the principles enunciated in *American Radio Association* v. *Mobile Steamship Association*, 419 U.S. 215 (1974), be split-off and made subject to the Act. There is but a single union activity with both foreign and domestic effects. Any attempt to bifurcate them at the behest of the American entities affected would be to interject the LMRA into the foreign controversy. Resolution of the "domestic" effects would necessarily resolve the foreign dispute.

The court of appeals erred by indulging in the very bifurcation which this Court has ruled is not permissible. Its rationale—that the original foreign dispute is not a *labor* dispute—finds no justification in logic nor in anything this Court has done or said. Moreover, it violates the comity considerations, which have played a major role in this Court's prior decisions, by intruding the Act and the NLRB into a dispute which involves not only foreign matters but the political policies of a foreign government.

If there is any domestic activity subject to the LMRA, it does not violate §8(b)(4). An inference of unlawful object from the necessary and foreseeable effects of the union's conduct is impermissible in this case, where the activity is equally referable to and fully explained by a lawful object. Petitioners have no primary labor dispute with any party. The activities under scrutiny are not the kind §8(b)(4) was designed to regulate. The union's motivation is admittedly political and conscientious, not economic. The approach taken by the courts in the antitrust area, of refusing to apply the Sherman Act to non economic boycotts, should be followed in the area of labor law.

In the final analysis, if there is any domestic activity cognizable under the LMRA, it is a primary dispute between the union and its employer over the scope of the

collective bargaining agreement, identical to the situation in the companion *Jacksonville Bulk Terminals, Inc.* case. Respondent should not be permitted to achieve the status of a third party beneficiary to the labor contract by forcing the case into the mold of a secondary boycott or to federalize what is really a state action for tortious interference.

To apply §8(b)(4) to petitioners' conduct would violate their First Amendment rights of free expression, free exercise, and freedom of association. It is beyond dispute that the challenged conduct was undertaken as a political protest and to refrain in conscience from servicing a wrongdoer. It was strictly limited to what was necessary to these ends. Until the decision below, the courts have been unanimous in holding that to use the LMRA to regulate First Amendment activity, no less than to use the Sherman Act, would be unconstitutional. The prospect of giving a governmental agency, the NLRB, veto power over political and conscientious activity adds to the repugnance.

Even if the court of appeals was correct on the law, it should not have granted summary judgment because issues of fact,—the union's intent, the necessary consequences of its action, and its members' desire to exercise First Amendment rights—require a trial.

ARGUMENT

I.

Petitioners' Activities Were Not in Commerce.

The terms "in commerce" or "affecting commerce" are used to describe those activities which Congress intended to fall within the reach of the LMRA and the jurisdiction of the NLRB. In a series of cases,[6] this Court has ruled that Congress intended to limit the jurisdiction of the Act as it pertains to foreign disputes.

In *Benz* the Court refused to hold preempted by the federal law a state court action to enjoin picketing of a foreign vessel by an American union over shipboard conditions affecting its foreign crew. The Court reviewed the legislative history of the LMRA and found that "[t]he whole background of the Act is concerned with industrial strife between American employers and employees." *Id.* at 143-44. The Court declined to extend coverage of the Act into foreign matters "where the possibilities of international discord are so evident and retaliative actions so certain," without "the affirmative intention of Congress clearly expressed." *Id.* at 147. In *McCulloch* it denied NLRB jurisdiction to hold an election among the foreign crewmen of a foreign registry ship. In *Incres* it upheld the right of the foreign entity to seek a state court injunction against a picketing American union seeking to organize the foreign crew. In *Ariadne* it found there was LMRA jurisdiction over the activities of an American union picketing to protest substandard wages paid by a foreign vessel to American nonunion longshore employees. The Court distinguished

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[6] *American Radio Ass'n* v. *Mobile S.S. Ass'n*, 419 U.S. 215 (1974); *Windward Shipping* v. *American Radio Ass'n*, 415 U.S. 104 (1974); *International Longshoremen's Ass'n Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195 (1970); *Incres S.S. Co.* v. *International Maritime Workers*, 372 U.S. 24 (1963); *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963); *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138 (1957).

Ariadne in that the dispute there "centered on the wages to be paid American residents." *Id.* at 199; *Windward,* 415 U.S. at 112.[7] In its latest pronouncements "recognition of the clear congressional purpose to apply the LMRA only to American workers and employers" remains the foundation of the Court's decisions. *Windward,* 415 U.S. at 110.

In *Windward* an American union engaged in "area standards" picketing of a foreign vessel in Houston to protest wages paid its foreign employees. The union urged that its activities were arguably protected by §7 of the Act, 29 U.S.C. §157, and so could not be enjoined by the state court. This Court, however, declined to limit its prior holdings. *Id.* at 113-14. Applying the principles it had evolved to determine whether activities fell within the range Congress intended to cover, the Court found that the thrust of the American union's activity was toward the foreign entities' foreign operations in that

> [v]irtually none of the predictable responses of a foreign shipowner to picketing of this type . . . would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate.

Id. at 115. It held, therefore, that the union's activities were not in commerce and that the foreign entity was not precluded from seeking relief in state court.[8]

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[7] Petitioners do not rely on the fact that one of the parties to the dispute in this case happens to be a foreign government. Indeed, this would be untenable under *Ariadne and Mobile,* 419 U.S. at 22 n.9. Rather, it is the *character of the dispute* that determines whether or not it is "in commerce." When the dispute is over the hiring of American labor in U.S. ports, it is "in commerce," even though a foreign employer may do the hiring. When it is over the foreign vessel's relations with its foreign employees, it is not. When it is over a foreign government's invasion of a remote nation, it is more emphatically not in commerce.

[8] The *Windward* Court was not blind to reality. It expressly noted that the activities held to be not in commerce for purposes of the Act in the earlier cases "were literally just as much 'in commerce' as were the activities covered in *Ariadne.*" *Id.* at 112.

Mobile involved the identical activity that had been addressed in *Windward* but in a different port. However, in *Mobile*, the state court action was brought by an American stevedore whose longshore employees refused to cross the picket line and by an intervening American farmer who wished to transport his goods. The union claimed that its activity was arguably a secondary boycott and thus subject to the exclusive jurisdiction of the LMRA. Having already determined in *Windward* that the underlying dispute between the union and the foreign entity which gave rise to the challenged activity was not in commerce, this Court held that the effects of the same activity could not be bifurcated when complained of by the American entities. The Court ruled that inducing the longshore employees not to handle the goods was not even arguably a secondary boycott because of its foreign object. The Court refused to hold

> [t]hat there is an independent controversy between petitioner unions, representing American seamen, and the contracting stevedores represented by respondent, [and] . . . that this independent dispute is subject to the jurisdiction of the Board.

Mobile, 419 U.S. at 220-21. It did so because the response of the American employees "was a crucial part of the mechanism" by which the union's foreign objective was to be achieved. *Id.* at 224.

> The effect of the picketing . . . is precisely the same whether it be complained of by the foreign-ship owners or by persons seeking to service and deal with the ships. The fact that the jurisdiction of the state courts in this case is invoked by stevedores and shippers does not convert into 'commerce' activities which plainly were not such in Windward.

Id. at 224-25.[9]

Despite its recognition that the union's activity would have effects which might semantically be described as domestic, the Court characterized the American entities which felt those effects as not, in the context of that dispute, being in commerce. *Id.* at 228.

> Since Windward held that the Houston picketing was not in or affecting commerce, it would be wholly inconsistent to now hold, insofar as concerns Board jurisdiction over a complaint by respondents, that the employer of the longshoremen who honored the picket line, or the shipper whose goods they did not handle, was in or affecting commerce.

Id. at 224.

The key to this holding was that the same union activity was generating both the foreign and the domestic effects and that the *Benz/Windward* line of cases did not "permit such a bifurcated view of the effects of a single group of pickets at a single site." *Mobile,* 419 U.S. at 222.

The applicability of *Mobile* to the case at bar is apparent if one imagines a prior, companion *"Windward"* case arising out of petitioners' challenged activities. Had the U.S.S.R. attempted to sue the ILA for interference with its contracts or to compel the ILA to unload a Russian ship berthed in an American port, the applicability of *Windward*

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[9] In the earlier cases the particular disputes centered on shipboard conditions of alien vessels and the foreign area intruded upon would have been maritime operations. Consequently, these terms appear in the opinions as the specific instances of those matters to which the Act does not apply. However, the Court has never attempted to limit the non-applicability of the LMRA to foreign maritime concerns or foreign labor matters. Manifestly, of the sum total of human activity a great portion in addition to "foreign maritime operations" or foreign labor matters falls outside domestic American commerce.

would be self-evident.[10] No court would have barred the Russian government from the Massachusetts courts on a theory of preemption by the LMRA. The union's activities were plainly designed to influence not American matters but the foreign policy of the Soviet Union—an area even further removed from domestic commerce than business decisions or maritime operations. The foreign party's predictable response could not, even indirectly, as it might in the earlier cases, be the kind of "wage-cost decision benefiting American workingmen which the LMRA was designed to regulate." *Windward*, 415 U.S. at 115.

Thus, if as in *Windward/Mobile* the first sally had been by the foreign entity itself, the lack of LMRA jurisdiction would have been apparent. The applicability of *Mobile* to Allied's present action is also clear. Both considerations which impelled this Court not to bifurcate the foreign dispute at the behest of the "all American cast" in *Mobile* apply here.

The anomaly which impelled the *Mobile* Court to refuse to re-characterize the activity by reason of the change in plaintiffs is present in this case as well.

> Acceptance of petitioners' argument would result in a rule whereby a state court had jurisdiction over a complaint for injunction filed by a foreign-ship owner claiming that picketing activities of a union were interfering with his business relationships with a contract stevedore, but the same court would have no jurisdiction where the contract stevedore sought an injunction

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[10] Significantly, the record discloses that at the time this action was commenced wood for Allied was destined to arrive in Boston aboard two Soviet vessels. J.A. at 39a. There was a very real potential that the hypothetical *"Windward"* case postulated here would materialise. It should be noted that this case would have presented the identical situation which the NLRB in *National Maritime Union of America (Shippers Stevedoring Co.)*, 245 NLRB 29 (1979) found not to be within its jurisdiction under the *Mobile* doctrine.

> on precisely the same grounds. The anomaly of such a result is reason enough to question it....

Mobile, 419 U.S. at 221.

Similarly, the conclusion would inevitably follow that, since the obvious object of the ILA action was to protest Soviet foreign policy, the union activity was not even arguably subject to the Act. Clearly there was in this case no dispute between the union and the American entities that was independent of its dispute with the Soviets. There was no domestic activity which could be bifurcated from the foreign activity. There was but one, unified ILA action. A single group of ILA longshoremen refused to handle Soviet goods at a single site.[11] The incidental effects complained of by the domestic entities sprang from this single activity. To the extent that the domestic impact could be said to have any purpose, it was a "crucial part of the mechanism" by which the union's foreign objective was to be achieved. The only way to prevent the domestic effects would be to end the foreign-directed activity itself.

The court of appeals below and the NLRB in the re-

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[11] Just as the Alabama locus of the dispute in *Mobile* did not differentiate it from the same union activity in Houston, addressed in *Windward*, the fact that the ILA action manifests itself in different ports is irrelevant. So, too, the distinction that petitioners here refused to handle rather than picketed is immaterial. Both forms of activity may arguably violate the LMRA. Moreover, as recognized by the administrative law judge in the related NLRB proceeding, to distinguish this case on the basis of the refusal to handle would be simply to invite picketing as the response to the next Afghanistan. 82a. Significantly, no tribunal or litigant has attempted to distinguish the ILA action from *Windward/Mobile* on this basis.

lated unfair labor practice proceeding[12] disregard the jurisprudential approach adopted by this Court in the *Benz/Mobile* line of cases, eschew its method of analysis, and reach a result incompatible with the controlling law.

The cornerstone of this Court's decisions has been the will of Congress. It has ruled that certain activities were not in commerce and so were not subject to the LMRA on the complaint of any party because of Congress' intent that the Act be limited to American labor matters. If Congress "did not fashion [the LMRA] to resolve labor disputes between nationals of other countries operating ships under foreign law", *Benz*, 353 U.S. at 143, it certainly did not fashion the Act to resolve non-labor disputes over the political and military policies of foreign governments. This Court has consistently held that the NLRB may not assert jurisdiction even indirectly over a domestic union's grievance with a foreign employer over its labor policy on ships touching our shores. It

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[12] Although the Board's decision is not under review here, it has been submitted to the Court. The NLRB is not entirely in accord with the court of appeals. The Board decision was 2-1 and overruled its own administrative law judge. However, in many respects the majority of the Board adopts the First Circuit's reasoning and shares its errors.

The NLRB's other reasons for finding jurisdiction are equally erroneous. One is a policy argument—that the ILA's conduct challenges American foreign policy and is national in scope and so requires the corrective action of an agency with national jurisdiction, rather than sporadic treatment under varying state laws. S.M. at 8a. This overlooks the facts that the *Windward/Mobile* activity was also multi-state and that keeping the matter out of federal courts and apart from United States policy is exactly what comity requires. *See* pp. 19-21 below.

The Board's second rationale is a wonder of tautology: the NLRB has jurisdiction because the NLRB has already found a violation. The statement that the ILA is guilty permeates the Board's jurisdictional consideration, and the earlier cases are distinguished on the basis that in those, except for *Ariadne*, there was no violation. This itself is erroneous, for *Mobile* clearly involved what would have been a secondary boycott if subject to the Act. Be that as it may, the Board makes its decision on the merits the mainspring of its power to *address* the merits.

would be anomalous to rule that the Board may assert jurisdiction over another union's altruistic activities directed at the military policies of a foreign government half a world away.[13]

The First Circuit has done what this Court has said could not be done—taken a bifurcated view of the single ILA action. Unable to say that the ILA/Soviet dispute is in any way connected with domestic commerce, the First Circuit splits off that preeminently foreign engagement and disregards it, viewing the American activity in isolation. The court of appeals could hardly deny that it was engaging in bifurcation. It employs the rationale that it is not bifurcating a *labor* dispute. It justifies this and attempts to distinguish *Windward/Mobile* by engrafting upon the earlier cases a requirement for application of their principles which was never mentioned by this Court—that the underlying foreign dispute must be a "labor" dispute.[14] Nothing in what this Court

[13] The NLRB itself has rejected the notion that the *Windward/Mobile* doctrine applies only when the foreign dispute is over labor matters. In *Shippers Stevedoring Co., supra*, the Board held that under *Windward* and *Mobile* it had no jurisdiction over the effects of an American union's refusal to service Russian vessels because of the union's belief that a United States law, the Cargo Preference Act, 46 U.S.C. §1241(b)(2), requiring that half of all cargo funded by a United States government agency be transported by American Flag vessels was being violated. While the union activity in *Shipper Stevedoring Co.* might have affected foreign maritime operations, they had nothing to do with a foreign *labor* dispute.

[14] The First Circuit's position is really another way of saying *Windward/Mobile* should be limited to almost the same fact patterns they confronted. The NLRB would go further and limit the decisions to identical situations involving "foreign maritime operations". S.M. at 23. The manifest fallacy of this approach is that it overlooks the fact that the earlier cases turned upon the characterization of the disputes involved as being not in commerce. By limiting their application to situations which involved "interference in the management or affairs of foreign companies, workers or labor organizations", 640 F.2d at 1374, 12a, the First Circuit is by necessary implication including within the area of domestic commerce a literal multitude of matters not yet addressed by this Court, no matter how foreign their object or effect.

did or said justifies such limitation.

The First Circuit, with the Board's concurrence, S.M. at 10a, expressly recognized the lack of NLRB jurisdiction to resolve the underlying foreign political dispute. 640 F.2d at 1372-73, 9a-10a. However, it held that the absence of a foreign *labor* dispute permitted the domestic effects to be segregated and made subject to the Act. 640 F.2d at 1374, 13a. This disregards the method of analysis employed in and mandated by *Mobile*—a method which was apparent to the dissenting judge, to the NLRB in *Shippers Stevedoring Co.*, to the Fifth Circuit in *Baldovin*, and to the First Circuit itself in *Walsh*. That analysis has two steps. First, it characterizes the underlying dispute to determine whether it is "in commerce" by examining the object of the union activity and considering whether the foreign entity's response can affect areas the Act was designed to regulate. If it is not, the second step inquires as to whether the domestic effects can be split off and said to be an independent dispute subject to regulation under the Act. This inquiry has nothing to do with the nature of the foreign dispute except that it is *not* in commerce.[15]

In the instant case the concession that the Act's jurisdiction does not extend to the ILA/Soviet dispute because it is foreign is consistent with the *Windward* analysis.[16] Where the First Circuit errs is in the *Mobile* analysis. Having correctly characterized the underlying dispute, the

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[15] Thus, the First Circuit correctly held in *Walsh* that "the question of jurisdiction turns on the nature and location of the underlying dispute," 630 F.2d at 874, and recognized that under *Mobile* "the Board could not exercise jurisdiction over a secondary boycott where the primary dispute was outside its jurisdiction." *Id.* at 874-75 n.13.

[16] Plainly, concern over the threat of *indirect* NLRB intrusion into the foreign dispute runs through the *Benz/Mobile* line. The fact that there is no labor dispute at all, but a political one, is all the more reason why it should not be subject to regulation by the labor Board.

court of appeals blatantly isolates the domestic effects. It justifies this split-off precisely by first *employing* bifurcation and then affixing the labels "labor" and "political" to the bifurcated prongs. It finds an "all American cast" by the very device of segregating and disregarding that prong which involves the foreign entity. In creating its *dramatis personae*, the First Circuit simply disregards the plain language of this Court:

> Petitioners interpret Windward as having done nothing more than establish that the maritime operations of foreign ships are not 'in commerce.' They assume that Windward said nothing about either the business activities of persons seeking to deal with such ships, or about whether, for these purposes, those activities are 'in commerce' or 'affecting commerce.'
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> Here, neither the farmer seeking to ship his soybeans, the stevedores who contracted to unload the cargo of the foreign-flag vessel, nor the longshoremen whom the stevedores employed to carry out this undertaking, were for these purposes engaged in or affecting commerce within the purview of the National Labor Relations Act.

Mobile, 419 U.S. at 221, 228.

In fact there was but one ILA activity with inextricable foreign and domestic effects. The union was not doing anything to the American parties that could, in its purpose, accomplishment, or effect, be divorced from what the union was doing vis-a-vis the U.S.S.R. It is impossible to point to a single act of the union affecting a domestic party that was not aimed at the Soviets, which might be segregated and made the subject of an independent dispute. The First Circuit's creation of the requirement of a foreign labor objective was but an excuse to indulge in the very bifurcation *Mobile* does not permit.

Both the First Circuit and the NLRB would infer the unlawful object towards neutrals, which is necessary to violate §8(b)(4), *solely* from the "necessary and foreseeable consequences" on the American entities of the union's refusal to service the Russians. 640 F.2d at 1375-76, 16a-18a; S.M. at 32a-34a.[17] This creates an unresolvable dilemma for both tribunals when it comes to the jurisdictional question. If the effects on American neutral entities flow directly and inescapably from the activities vis-a-vis the Russians, these effects cannot be separated from their foreign involvement and made the subject of an independent dispute.[18]

Under the decision below, if the ILA's dispute with the Soviets had been a "labor" dispute, bifurcation would not have been possible and the union activity would not be subject to the LMRA. Had the ILA couched its grievance in terms of lower wages paid to Russian workers or the use of Gulag slave labor in longshore activities at the other port, the Act would not apply. Yet the "all American" dispute, its participants and effects, would be identical. These are in no way affected by whether the union's ire with the Soviets is over labor matters or military matters. By singling out motivation as the fulcrum to permit bifurcation the First Circuit creates the disquieting situation that the union may be subject to LMRA jurisdiction for the very reason that its foreign dispute is both political and conscientious. *Mobile* says the LMRA may not be the vehicle for affecting matters of foreign commerce. The First Circuit says it may be the vehicle for affecting matters of foreign politics and conscience.

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[17] The Board states: "The ILA can affect the USSR's stance on Afghanistan, if at all, only through an effective nationwide boycott of Russian cargo." S.M. at 8a.

[18] The Board's administrative law judge perceptively noted that "[i]mputing such secondary intention to the union can not be done without also imputing an intention to have an impact on foreign trade." S.M. at 98a. The more inevitable the domestic effects, the more they are a "crucial part of the mechanism" by which the union's foreign objective is to be achieved.

The First Circuit's denigration of the comity aspects of this case by focusing solely on interference by the NLRB misunderstands and oversimplifies this Court's comity considerations.[19] The seminal decision, *Benz*, does not mention the NLRB at all. Rather, it was the Act itself that was not intended by Congress to be intruded into foreign matters. *Benz*, 353 U.S. at 142-44. In *Windward* the Court reiterated "its reluctance to intrude *domestic labor law* willy-nilly into the complex of consideration affecting foreign trade." *Windward*, 415 U.S. at 110. (emphasis supplied). In none of the cases where this Court has invoked comity, with the exception of the *McCulloch* election case, was it contemplated that the NLRB would step in and actually attempt to dictate resolution of the underlying foreign dispute, whether labor or otherwise.

The practical result of NLRB jurisdiction in a §8(b)(4) proceeding must always benefit the foreign entity, for while the Board cannot make it comply with the union's demand, the Board can, by finding a violation, remove the inconvenience of the union's action. Undoubtedly, in the present case the Kremlin would applaud the NLRB's decision no less than it would the First Circuit's. But the foreign entity's pique or pleasure at the result is not the crux of the comity question. In *Benz*, as in *Windward/Mobile*, it was not suggested that the NLRB would direct the foreign entity to pay higher wages or improve shipboard conditions.[20] The possibility of NLRB intrusion, then, is not the sole antagonism to comity which

[19] The court of appeals repeats that this case involved "no question of interference in the affairs of a foreign employer." 640 F.2d at 1372, 1374, 9a, 12a. (emphasis supplied). It need hardly be said that NLRB interference with a foreign nation's affairs other than labor matters could equally, indeed more abrasively, run afoul of comity considerations.

[20] Similarly, in *Shippers Stevedoring Co.*, the NLRB itself never contemplated enforcement of the provisions of the Cargo Preference Act.

has concerned this Court. This is underscored by the repeated reference in the controlling decisions to interference by the *union* or from the effects of its activities. *Mobile*, 419 U.S. at 222, 223, 224, 228; *Windward*, 415 U.S. at 112, 113, 115, 119; *Ariadne*, 397 U.S. at 199, 200.

Comity dictates that a dispute involving a foreign entity over foreign matters not be made into a federal case. The doctrine of preemption presupposes that a matter is so much of national concern as to preclude the states from acting. *San Diego Building Trades Council* v. *Garman*, 359 U.S. 236, 240 (1959). To invoke this doctrine would be to force the foreign entity to litigate its claim within the narrow structure of the LMRA while denying it access to the state courts with their full panoply of common law rights and remedies. The intrusion of the NLRB, while not determinative, certainly aggravates the situation, for there is always the possibility that the Board will rule in favor of the union.[21] This would not require the foreign entity to accede to the union's demand. But it would have the perceived effect of putting the *imprimatur* of an agency of the United States on the union's action. Moreover, any refusal by the Board to find a violation would leave the foreign entity without a remedy, for access to state court is denied when LMRA jurisdiction is upheld.

In this context, the suggestion of the Solicitor General that the outcome might "be viewed by other nations as reflecting an extension of United States foreign policy", Amicus Brief in *JBT* at p. 26, n.17, egregious as this is as a basis for arranging the outcome of private litigation, has some validity. Comity is served by keeping the United States, its courts or administrative agencies, out of the picture and allowing the controversies to be resolved at the contractual, arbitral or state court level. It requires that

[21] Obviously, this was the expectation of the union petitioners in the earlier cases who argued *for* Board jurisdiction.

the claim of foreign entities arising out of disputes about their foreign affairs not be made the sole province of the federal government, to be litigated under the limited scope of a federal labor statute.

The reliance by both the First Circuit and the NLRB on the *Grain Elevator* decisions[22] is misplaced. Once the applicability of the *Windward/Mobile* holdings is seen, these earlier lower court decisions can hardly take precedence over later Supreme Court holdings. The footnote in *Mobile*, 419 U.S. at 225, n.10, may not be the pretext for disregarding a thoroughly briefed and carefully reasoned opinion by the highest Court. Nor need one go as far as Judge Aldrich and the administrative law judge and question the *Mobile* dictum. The *Grain Elevator* cases are quite distinguishable from both *Mobile* and the case at bar.[23] Indeed, the distinguishing factor pinpoints the error of the First Circuit and the Board in finding LMRA jurisdiction in this case.

In *Grain Elevator*, a Canadian union disputing with its Canadian shipping employer induced an American union not to handle for its American employer goods destined for the Canadian employer's ships. The American union was not involved in the original Canadian dispute at all. It never claimed to be a party to any underlying dispute over a matter not within domestic commerce. It claimed only to be honoring first an actual picket line and later what it conceived to be a phantom picket line of the Canadian disputant union. The Canadian union might have been content to

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[22] *Madden* v. *Grain Elevator Workers Local 418*, 334 F.2d 1014 (7th Cir. 1964), *cert. denied*, 379 U.S. 967 (1965); *Grain Elevator Workers Local 418* v. *NLRB*, 376 F.2d 774 (D.C. Cir.), *cert. denied*, 389 U.S. 932 (1967), *enforcing Grain Elevator, Flour and Feedmill Workers, (Continental Grain Co.)*, 155 NLRB 402 (1965).

[23] It should be noted that the *Grain Elevator* cases do not well serve the First Circuit's purpose. In those cases, as the court of appeals was aware, the underlying dispute *was* a labor dispute. 640 F.2d at 1372-73, 9a-12a. Lack of a foreign labor dispute, then, can hardly have been the reason for this Court's distinguishing those cases from *Mobile*.

press its cause entirely at home. Instead, it opened a second front in the United States. The conduct complained of was the activity here, and the issue was what was the object of this added American activity.[24]

In *Grain Elevator* the object of the Canadian union's American activity was only an adjunct to its original dispute, to involve the American entity so as to exert *added* pressure. Thus, the American activity was independent of the Canadian activity. It was capable of bifurcation and resolution without intrusion into the foreign dispute. It did not, like *Windward/Mobile* and the present case, involve a single union response which simultaneously had an impact on both the foreign and American entities, resolution of which at the behest of one would necessarily put an end to the activity with respect to the other. The American activity was susceptible of resolution without in any way determining the Canadian dispute. In *Mobile* terminology, the American activity was not "a crucial part of the mechanism" by which the Canadian object was to be accomplished. Despite the § 10(*l*) injunction and the Board's cease and desist order, the Canadians' dispute could, and did, go on. True, one additional weapon in the arsenal of the Canadian union was denied it, but resolution of the American dispute was not conclusive as to the foreign dispute.[25]

In *Mobile* and the instant case, the interdependency of results precludes the bifurcation that was appropriate in *Grain Elevator*. The union here was not involved in dis-

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[24] The NLRB decision disposed of the jurisdictional issue in a footnote. 155 NLRB at 403, n.6. The decision itself is devoted to the "movable situs" doctrine and the possibility of a "phantom" picket line.

[25] How crucial the challenged union activity may be to its foreign objective necessarily depends upon the facts of each case. The Fifth Circuit is correct in saying "no bright line" can be drawn. *Baldovin*, 626 F.2d at 453, n.5. The present case, however, like *Mobile*, is at the far end of the spectrum. There is but one union activity, which, if removed, is removed altogether.

parite activities in different locations. Here, as in *Mobile*, there was but a single union activity which had simultaneous domestic and foreign effects. Any splitting off and resolution of the domestic effects, under the pretext of finding an independent American controversy, would necessarily resolve the dispute and end the activity which under the *Windward* analysis is conceded to be foreign. In every theoretical and practical sense, the LMRA would be used to resolve foreign matters never within the contemplation of Congress.

To affirm the First Circuit's decision would be to overrule *Mobile* and to adopt the position of its dissent. *Mobile*, 419 U.S. at 226. Such a reversal after a mere eight years would shatter *stare decisis*. It would also involve judicial usurpation, for the cornerstone of the cases from *Benz* onward has been the will of Congress. The lack of an express mandate impelled this Court to find no LMRA jurisdiction in *Benz*. The Court reiterated its position in *Windward*, noting Congress' seventeen year silence. *Windward*, 415 U.S. at 111. Since *Mobile* seven more years have passed and Congress has not expressed the clear affirmative intention which this Court has insisted is the prerequisite to intruding the LMRA into foreign affairs.

It is the inescapable fact that in the decisions from *Benz* to *Mobile* this Court declined to find LMRA jurisdiction when it was sought by a union. For the Court now to do an about face, when the union is urging that the Act does not apply, would compromise the principle of equal justice. Whether or not Allied's remedy, if any, lies under the Act or in state court is simply not worth that compromise.

II.

Petitioners' Conduct Did Not Violate §8(b)(4).

Having bifurcated the Soviet dispute to avoid the strictures of *Mobile*, the First Circuit proceeds to construct a violation of § 8(b)(4) from the union's conduct, frankly admitting its decision is "a fortiori." However, once the Russian dispute is split off, necessary ingredients of a secondary boycott disappear as well.[26] The First Circuit's finding of a violation should be reversed on several grounds.

A. *The Unlawful Object, Essential to a Violation of § 8(b)(4), Cannot Be Made Out.*

For a union's conduct to violate § 8(b)(4) "an object must be to force or require their employer or another person to cease doing business with a third person." *Local 1976, United Brotherhood of Carpenters* v. *NLRB*, 357 U.S. 93, 98 (1958). To find an unlawful object, both the court of appeals and the NLRB were required to fall back upon an a priori approach which amounts to a presumption of guilt. The First Circuit held that, since the refusal to handle goods "a fortiori" forces an employer to cease doing business with the source of those goods, "it is difficult to say that the cessation of business is not at least *an* object of the union order." 640 F.2d at 1375, 16a (emphasis in the original).

The fallacy of this reasoning is that it deletes the requirement of an unlawful object from the Act. As this Court has

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[26] Having, for jurisdictional purposes, purported to find an independent dispute capable of bifurcation, both the First Circuit and the NLRB cannot avoid reintroducing the U.S.S.R. in order to find a violation. Their approach parallels that of the petitioner in *JBT*, who emphasized the ILA/Soviet controversy to argue that there was no labor dispute, then ignored it to argue that the dispute was arbitrable. *See JBT* Respondents' Brief, at 9. Although this approach may be necessary for an advocate, an adjudicatory tribunal is precluded by logic and justice from basing two essential elements of its decision upon mutually exclusive hypotheses.

interpreted the statute, § 8(b)(4) requires *both* the prohibited activity *and* the wrongful object.[27] The First Circuit would find the violation from the activity alone. Manifestly, every strike has as its "necessary and foreseeable consequence" cessation of the employer's business. Under the First Circuit's construction, all strikes would be unlawful.

The court of appeals' error here is one of common sense. It raises every necessary incident of an act to the level of a purpose.[28] One cannot deny that the *effects* are present, but this, without more, does not warrant one to jump to the conclusion of an unlawful object. The First Circuit and the NLRB claim the right to arbitrarily place an unlawful construction on the union's acts without a jot of evidence beyond the effects themselves, which are equally referable to a lawful intent.[29] This renders subparagraph (B) of § 8(b)(4) redundant. Since every refusal to handle must have the necessary and foreseeable consequence, it becomes superflu-

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[27] *NLRB* v. *Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 685-90 (1951).

[28] Application of this principle to other aspects of this case demonstrates the fallacy. If Clark had been patriotically motivated to cease handling Soviet cargo, this would undoubtedly have cut its volume of business and caused layoffs among its employees. But no one would suggest that Clark's *object* was to cause the employees to lose work. A direct effect of the ILA refusal to service the U.S.S.R., fully as inevitable as the impact upon any employer, was a loss of wages to longshoremen. Under the First Circuit's reasoning, one would be bound to say that "an object" of the union's action was to lose money for its members.

[29] The findings of every court as to the carefully circumscribed nature of the union's activity, of which the First Circuit was not unaware, *see* 640 F.2d at 1380, 26a, as well as the evidence submitted in opposition to respondent's motion for a preliminary injunction in this case—all tend to negate any inference that the union's object was other than as claimed: a simple desire not to be involved in traffic with the Soviets. If one assumes *arguendo* that this is true, the facts of this case would not be changed one whit. One cannot envision how this lawful object could be pursued without somehow affecting third persons.

ous for the Act to require the additional element that this be one of the union's *purposes.*

This is not to say that the common law rule of circumstantial evidence has no place in labor law. *Cf. NLRB* v. *Retail Stores Employees Union, Local 1001,* 447 U.S. 607 (1980). It is only to say that the probative value of the effects must be considered in the light of the evidence as a whole. The inference cannot be elevated to the level of an irrebuttable presumption—an "a fortiori" violation.[10]

Moreover, the political and conscientious context of the present case seriously undermines the inferential value of the effects of petitioners' conduct. In the world of economics the inference is credible because commercial activity is undertaken by reason of its expected results. In the realm of conscience this is not necessarily so. A person sometimes acts according to his conscience, regardless of the practical consequences.

> In the political boycott setting, by contrast, the assumtions underlying the economic model do not necessarily apply. An individual who refuses to deal for political reasons may be indifferent to whether others pursue a similar course of action. . . . [H]e might simply feel strongly enough about his grievance to register his protest alone.

Comment, *Political Boycott Activity And The First Amendment,* 91 Harv. L. Rev. 659, 689 (1978). The consequence of action, then, may be irrelevant where, both as protest and as conscientious abstention, the conduct is undertaken for its

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[10] By granting summary judgment on petitioners' motion to dismiss, the First Circuit precluded the union from presenting to the trier of fact evidence to rebut any inference that might be drawn from the effects of its action. *See* pp. 35, n.47, 43-45 below.

own sake without hope of practical effect.[31]

That the First Circuit and the NLRB have done no more than presume a violation is clear when one considers that the inference they would adduce from "necessary and foreseeable consequences" is untenable with respect to three of the four parties to whom they apply it. Petitioners' refusal to handle inevitably affected Clark, but that is as far as necessity goes. The record shows, J.A. at 14a, 37a, 39a, 41a, 47a—and the court of appeals was aware, 640 F.2d at 1370, 3a—that, after the ILA refused to handle Russian goods, Allied and Waterman transported goods from the U.S.S.R. to the United States via the port of Montreal, where the ILA action did not apply. J.A. at 61a. Thus, it is false to say that the inevitable consequences of the ILA's conduct was to force Allied and Waterman to cease doing business with each other and/or to force others to cease doing business with the Soviets.[32] That business could have continued without the participation of American longshoremen.[33] The only

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[31] The ILA is not so naive as to believe that its protest will be heeded or that its action will succeed in reforming the Soviets, where more powerful forces have not availed. In announcing the grain embargo, President Carter said:

> We anticipate that this withholding of grain to the Soviet Union will not force them to withdraw their troops from Afghanistan. We understood this from the beginning. We don't think that economic pressure or even condemnation by the United Nations of the Soviet Union will cause them to withdraw their troops.

Weekly Compilation of Presidential Documents, Vol. 16, No. 2, Monday, January 14, 1980, at 42.

[32] The NLRB is satisfied with a shotgun approach, wherein the ILA is found to be forcing everyone to stop doing business with everyone. "The object of this inducement, encouragement and coercion was to force each of the neutrals to cease handling goods emanating from Russia and to require Clark, Waterman, and Allied to cease doing business with each other." J.A. at 33a n.43. *See also* the Board's Conclusions of Law, J.A. at 37a-38a.

[33] That Waterman or the U.S.S.R. seized upon the ILA action as a pretext for cancelling prior commitments is not a necessary or foreseeable consequence of the union's conduct.

entity upon which the ILA's action could have an inevitable effect was its own employer.

B. *There Can Be No Violation of § 8(b)(4) Without a Primary Labor Dispute.*

This Court has recognized that Congress enacted §8(b)(4) out of "concern over the involvement of third parties in labor disputes not their own." *NLRB* v. *Local 825, Operating Engineers,* 400 U.S. 297, 302 (1971). Both the First Circuit and the Board repeatedly insist—and rightly so, *see JBT,* Respondents' Brief at 4, 25-27—that the ILA has no dispute with Clark, Waterman and Allied.[34]

All the decided authority would require a primary labor dispute as a prerequisite to a secondary boycott. *NLRB* v. *International Longshoremen's Association (Ocean Shipping),* 332 F.2d 992 (4th Cir. 1964); *Danielson* v. *Fur Dressers,* 411 F. Supp. 655 (S.D.N.Y. 1975).[35] No honest

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[34] By limiting the scenario to an "all American cast," as a prerequisite to jurisdiction, the First Circuit has composed a drama where the cast is comprised entirely of neutrals. 640 F.2d at 1374-75, 1377, 1379, 14a, 19a, 23a; S.M. at 14a, n.20, 28a. But without the ILA/Russian dispute there is nothing for the American entities to be neutral with respect to. Thus, the essence of a secondary boycott—the involvement of a neutral in a dispute not his own—is precluded by the very finding necessary to invoke jurisdiction of the Act. This Court has said that the test of a secondary boycott is whether the union's pressure is "calculated to satisfy union objectives elsewhere." *National Woodwork* v. *NLRB,* 386 U.S. 612, 644 (1967). But the First Circuit and the Board must disregard the "elsewhere" in this case—for that is unquestionably across the sea and not "in commerce."

[35] Although the weight of dictum would seem to be contra, in all the cases cited by the First Circuit and the Board for the proposition that a primary labor dispute is not necessary, primary labor disputes were apparent from the facts before the courts. *See* 20a; S.M. at 122. This Court's language in *National Woodwork, supra,* quoted by the Board at S.M. at 113, is taken out of context. The Court was addressing the issue of whether the object of an agreement was work preservation or work acquisition. It did not purport to decide whether a primary labor dispute is an element of a §8(b)(4) violation.

appraisal of this case can say that the ILA has a labor dispute with any person, except possibly its struck employers.

C. *Petitioners' Conduct Was Not the Kind of Activity § 8(b)(4) Was Enacted to Prevent.*

Contrary to the First Circuit's approach, which would seem to require express legislative *permission* for union action, 640 F.2d at 1378, 21a, this Court has said:

> Whatever may have been said in Congress preceding the passage of the Taft-Hartley Act concerning the evil of all forms of 'secondary boycotts' and the desirability of outlawing them, it is clear that no such sweeping prohibition was in fact enacted in §8(b)(4)[(B)]. The section describes and condemns specific union conduct directed to specific objectives.

United Brotherhood of Carpenters & Joiners v. *NLRB*, 357 U.S. 93, 98 (1958).

The Court has repeatedly affirmed that the LMRA is concerned with the *economic* relationship between employer and employee.[36] There is nothing in the Act's legislative history or language to suggest that it was designed to be used as a tool for resolving matters that have nothing to do with labor relations.

Behind the decisions which require a primary labor dispute for a violation of §8(b)(4) is the awareness that the secondary boycott proscriptions are out of place when applied to a non-labor situation.[37] The district courts take a

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[36] *NLRB* v. *Burns Int'l Security Servs., Inc.*, 406 U.S. 272 (1972); *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970); *NLRB* v. *American Nat'l Ins. Co.*, 343 U.S. 395 (1952); *NLRB* v. *Bradford Dyeing Ass'n*, 310 U.S. 318 (1940); *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270 (1956).

[37] The First Circuit itself was troubled by "[t]he elusiveness of any attempt to fit aspects of this rather unique case comfortably within the traditional categories of labor law . . . ." 640 F.2d at 1372, n.3, 9a, n.3.

similar approach in cases where unions attempt to remove to federal court, under the aegis of LMRA §303, disputes which involve tortious activity under state law. Where the dispute is not over *labor* matters, plaintiffs are left to their remedies in state court, notwithstanding that one of the parties is a labor union.[38] *Big Apple Supermarkets* v. *Dutto*, 237 F. Supp. 774 (E.D.N.Y. 1965); *Jody Fair Inc.* v. *Dubinsky*, 225 F. Supp. 695 (S.D.N.Y. 1964); *Vincent Ingino Inc.* v. *Certified Preferred, Inc.*, 222 F. Supp. 109 (E.D.N.Y. 1963). *Contra, Roywood Corporation* v. *Radio Broadcast Technicians*, 290 F. Supp. 1008 (S.D. Ala. 1968).

These labor law holdings are buttressed by numerous decisions in the analogous antitrust area, where the courts, relying on this Court's recognition that Congress intended that the Sherman Act's proscriptions be limited to "commercial transactions," *Apex Hosiery* v. *Leader*, 310 U.S. 469, 493 (1940), have refused to apply the antitrust laws to boycotts that were not economically motivated because "the conduct alleged is simply not the kind the Sherman Act was designed to regulate." *Miller & Son Paving Inc.* v. *Wrightstown Township Civic Association*, 443 F. Supp. 1268, 1271 (E.D. Pa. 1978), *aff'd*, 595 F.2d 1213 (3d Cir.), *cert. denied*, 444 U.S. 843 (1979); *Missouri* v. *National Organization for Women, Inc.*, 467 F. Supp. 289 (W.D. Mo. C.D. 1979), *aff'd*, 620 F.2d 1301 (8th Cir. 1980); *Crown Central Petroleum*

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[38] The reasoning of these courts has been expressed as follows:

> The prime object of the defendants' acts as alleged in the complaint is an intentional purpose to inflict injury and damage upon the plaintiff without legal justification in order to compel it to pay a debt for which it is not legally liable. The circumstance that the means employed to achieve that objective happen to parallel conduct condemned as an unfair labor practice does not change the essential nature of plaintiff's cause of action.

Judy Fair Inc. v. *Dubinsky*, 225 F. Supp. at 698.

Corp. v. *Waldman*, 486 F. Supp. 759 (M.D. Pa. 1980).[39] The First Circuit itself has adopted this view. *Council for Employment and Economic Energy Use* v. *WHDH Corp.*, 580 F.2d 9 (1st Cir. 1978), *cert. denied*, 440 U.S. 945 (1979).[40]

So in the case at bar, finding no economic or labor objective in the union's conduct, this Court should decline to impress the LMRA onto what is an essentially non-labor situation.

D. *The Only Feasible Labor Dispute Is With Petitioners' Employers.*

Whether or not one closes one's eyes to the dispute with the Soviet Union, it is clear that the only rational labor-related activity in this case is between petitioners and their employer. The ILA has no labor relations with Allied or Waterman. It has no economic dispute with either. Its conduct bears directly on Clark, and the inference upon which the First Circuit depends to find a violation can be made only with respect to Clark.

The accurate characterization of this case under the LMRA, then, is as a dispute between the union and its employer over what work is required by their collective bargaining agreement. As the Solicitor General noted in *JBT*, the inclusion in a labor contract of a conscience clause permitting the union to decline morally repugnant work would be entirely appropriate.[41] *JBT*, Amicus Brief

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[39] In each of these cases all the elements of a *per se* antitrust violation were present. No less than in the present case, the boycott's effects were felt in the marketplace, and it was the conscious intent of the participants to put *economic* pressure on the boycotted entities.

[40] Indeed, the First Circuit had no difficulty in dismissing Allied's Sherman Act count on the grounds that the ILA's motive was not economic. 640 F.2d at 1380, 26a.

[41] This is not to say that the controversy with the employer in *JBT* is merely over work assignment, as the Solicitor suggests in that case. Rather, it is a resulting dispute over the scope of the no-strike clause itself. *See JBT*, Respondent's Brief at 21-25.

at 26, n.17. Whether or not the ILA is required to handle goods tainted by a dispute which cannot be resolved by arbitration has already engendered extensive litigation. There is good authority that, even without a conscience clause, the ILA collective bargaining agreement permits the union's conduct because its no-strike provision is coterminous with its agreement to arbitrate, thus allowing the union to strike over matters that cannot be arbitrated.[42] That neither Clark nor the Boston Shipping Association have exercised the right to seek arbitration of this question, J.A. at 29a-30a, does not give Allied license to call the situation a secondary boycott.

E. *This Court Should Not Permit Federalization of What Is Essentially a State Claim.*

When one remembers the *JBT* case, it is apparent that Allied in the case at bar is seeking to make itself a third-party beneficiary of Clark's contract with the ILA. This is not possible under LMRA §301, 29 U.S.C. §185; *Isbrandtsen Co. Inc.* v. *Local 1291, International Longshoremen's Association,* 204 F.2d 495 (3d Cir. 1953).[43] So Allied postures the case as one under §303.

Similarly, any claim Allied may have directly against the ILA sounds in tortious interference with contract. Clearly, Allied has no *labor* interest in the matter. Its interest is to have its contracts performed. Nor has the union any economic dispute with Allied. Under the decisions cited at p. 30 above, there can be little doubt that, if Allied had elected to press its tort claim in the

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[42] This would seem to be the First Circuit rule. *See, NLRB* v. *C.K. Smith & Co., Inc.*, 569 F.2d 162 (1st Cir. 1977), *cert. denied*, 436 U.S. 957 (1978). *See also, JBT* Respondents' Brief at 32, n.29.

[43] *See also, JBT*, Amicus Brief at 17, n.12, where the Solicitor General agrees that only a party to a collective bargaining agreement may sue under §301. The Solicitor General excuses the participation in *JBT* of Occidental and Hooker (the analogues to Allied in this case) on the grounds that Jacksonville Bulk Terminals, Inc. was their subsidiary.

Massachusetts courts and the ILA had attempted to remove it to federal court under §303, the district court would have remanded to the state court. Conversely, Allied should not be permitted here to disguise its essentially state tort action to invoke the LMRA."

III.

Petitioners' Conduct Is Protected by the First Amendment.

A. *First Amendment Rights Are at Stake in This Case.*

Petitioners' refusal to engage in morally reprehensible activity, with its dual objectives of satisfying the demands of conscience and protesting aggression, is thrice protected by the Constitution.

Within the express guarantee of free speech is the right to proselytize political and ideological causes, *Wooley* v. *Maynard*, 430 U.S. 705, 714 (1977), and to communicate social, political or philosophical messages. *Young* v. *American Mini Theatres*, 427 U.S. 50 (1976); *Epperson* v. *Arkansas*, 393 U.S. 97 (1968). Expressive conduct, *see, e.g., Tinker* v. *Des Moines*, 393 U.S. 503 (1969), as well as the right to remain silent or inactive as a symbolic form of communication is protected by the First Amendment. *Spence* v. *Washington*, 418 U.S. 405 (1974); *Brown* v. *Louisiana*, 383 U.S. 131 (1966); *Sweezy* v. *New Hampshire*, 354 U.S. 234 (1957).

The right of conscience is implied from the free exercise clause. *See, e.g., Gillette* v. *United States*, 401 U.S. 437 (1971); *Welsh* v. *United States*, 398 U.S. 333 (1970); *Sherbert* v. *Verner*, 374 U.S. 398 (1963). In defining the area of "conscience" this Court has rejected a rigidly theistic definition, *Toraso* v. *Watkins*, 367 U.S. 488 (1961),

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" The suitability of a state tort claim for weighing the merits of this case with its First Amendment dimensions is discussed at p. 43, n.63 below. The consistency with *Mobile* need not be belabored.

and has required only a "sincere and meaningful belief which occupies in the life of its possessor a place parallel to that fulfilled by . . . God . . . ." *United States* v. *Seeger*, 380 U.S. 163, 176 (1965). The distinguishing characteristic of conscience is its reliance on "moral, ethical or religious beliefs about what is right and wrong" as opposed to mere "considerations of policy, pragmatism, or expediency." *Welsh* v. *United States*, 398 U.S. 333, 342-43 (1970).

In the case at bar it is admitted that the union's conduct is not selfish or economic, but rather to protest the Soviets' aggression. Every tribunal and litigant has recognized this communicative and political nature of petitioners' activities. The conscientious dimension has yet to be adequately considered but is beyond serious dispute.[45]

That military aggression against a weaker neighbor should inspire moral revulsion is self-evident. The ILA's was but one voice in a worldwide chorus of outrage at the Soviets' wrong. The refusal to contribute even indirectly to the evildoer's malfeasance is a basic ethical response.[46] The degree of involvement which would be wrong necessarily depends upon the subjective view of the actor. But the absten-

[45] The First Circuit avoids the union's claim of conscience. Citing a series of "refusal to handle" cases, it asserts that in each the union could have claimed that the work was "repugnant" to its members. 640 F.2d at 1375, 15a-16a. This cynical attitude hardly befits treatment of a serious constitutional issue. Each case cited involved a traditional labor dispute. The union's motivation was unmistakably economic. An attempt to invoke conscience would have been a transparent subterfuge. *Cf. California Motor Transp. Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1972). But here, as every court agrees, the ILA had *no* economic purpose. Its conduct was inspired solely by outrage at the Soviet aggression. Longshoremen had nothing to gain and everything to lose by their abstention. Both their motivation and their refusal to be involved with the aggressor are genuinely within the realm of conscience.

[46] To aid or abet a criminal makes one an accessory. 18 U.S.C. 2. Giving aid or comfort to the enemy is the essence of treason. 18 U.S.C. §2381.

tion from what is perceived to be wrong is the primary command of conscience not to do evil.

The shelter of the First Amendment extends to labor unions and their members, *Thomas* v. *Collins*, 323 U.S. 516 (1945); *Thornhill* v. *Alabama*, 310 U.S. 88 (1940). It is no longer open to question that a labor union's right to engage in communication, *United Mine Workers* v. *Illinois State Bar Association*, 389 U.S. 217 (1967), and political activity, *Abood* v. *Detroit Board of Education*, 431 U.S. 209 (1977), is constitutionally protected.

The union may also assert a right of conscience on its own and its members' behalf.[47] The First Circuit and the Board would seem to concede the right of individual union members to engage in First Amendment activities, but would deny it to the union as an organization. 640 F.2d at 1379, n.11, 23a, n.11; S.M. at 30a, n.38.[48]

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[47] The First Circuit disputes the ILA's consistent assertion that its conduct is the will of the membership. 640 F.2d at 1379, n.11, 23a, n.11. The impropriety of this as a basis for summary judgment, when the defendant has not had an opportunity to present its case and when what evidence there is corroborates its assertion, is manifest. At a trial petitioners are prepared to introduce evidence that, even before the International took a position, longshoremen in Boston refused to handle Allied's Russian wood; that for two weeks prior to President Gleason's announcement the International was bombarded with communications from local leaders conveying the desire of their rank and file not to service the Soviets and requesting the union leadership to take a position; that the ILA did not act until it had ascertained the sentiments of an overwhelming portion of the membership; and that the International's involvement was a desire to keep the situation under control, to prevent wildcat strikes, and to protect the longshoremen in the exercise of their rights. *See* J.A. at 59a, 60a. The NLRB's Administrative Law Judge discounted the fact that the Russian policy originated with the rank and file. This was not inappropriate in the §8(b)(4) "inducement" context he was considering. The ILA certainly "encouraged" its members in the stance they had taken by backing them. For First Amendment purposes, however, the genesis of the union's stance is crucial and is capable of proof.

[48] The NLRB's sole rationale for sweeping aside First Amendment considerations—that they were carried out in concert, S.M. at 30a, n.38—presupposes that, when constitutional rights are exercised in association with others, they are forfeited.

The right of an association to assert on behalf of its members a right personal to them has been repeatedly recognized by this Court.[49] No sound basis exists for denying this principle when the association is a labor union. Once it is recognized that the individual members possess a protected right, it follows that these rights may be exercised in association with others. To deny this liberty would itself violate the First Amendment. *Shelton* v. *Tucker*, 364 U.S. 479, 485-86 (1960).

Like other associations unions derive their First Amendment right from the rights of their members. Therefore, when the union's rights are abridged, its members' rights are abridged as well.[50] It is not the ILA or Local 799 that must actually engage in the unconscionable activity. It is the individual longshoremen. The union, then, has a right

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[49] *Warth* v. *Seldin*, 422 U.S. 490, 511 (1975); *NAACP* v. *Patterson*, 357 U.S. 449 (1958); *NAACP* v. *Button*, 371 U.S. 415 (1963); *International Union, etc.* v. *National Right to Work*, 590 F.2d 1139 (D.C. Cir. 1979). *See also Investment Co. Inst.* v. *Board of Governors of the Fed. Reserve Sys.*, 606 F.2d 1004 (D.C. Cir. 1979); *American Jewish Congress* v. *Vance*, 575 F.2d 939 (D.C. Cir. 1978); *Socialist Workers Party* v. *Hardy*, 480 F. Supp. 941 (E.D. La. 1977); *Socialist Workers Party* v. *Attorney Gen. of the United States*, 463 F. Supp. 515 (S.D.N.Y. 1978).

[50] The manner in which the association decides when and how to exercise its members' rights is a matter of internal procedure. The union may be challenged under its own operating charter. Moreover, union members also have a First Amendment right to refuse to participate in the political activities of their union, and there exists an appropriate remedy personal to each such member, apart from the LMRA. *See Abood* v. *Detroit Bd. of Educ.* Petitioners have not compelled their members to follow a particular course of conduct; rather, the members themselves have set the course which the union has officially enunciated as its policy. The suggestion that a vote was required, instead of the informal canvas actually conducted, finds no justification in law. The duly elected leadership of the union is presumed to speak for the membership unless challenged. One could as well require a referendum before the union exercised its First Amendment rights to endorse a piece of legislation or a political candidate. *Cf. Abood* v. *Detroit Bd. of Educ.*

of conscience in the same manner it has rights of speech and political activity, derivatively from its members.[51]

B. *To Hold That Petitioners' Conduct Violates §8(b)(4) Would Contravene the First Amendment.*

The argument that petitioners' conduct is not of the kind Congress intended to regulate under §8(b)(4) takes on added force under the First Amendment. Not only was petitioners' conduct non-economic, it was the kind of conscientious, expressive and political activity that is protected by the Constitution. As the Sixth Circuit has observed:

> Nowhere in the National Labor Relations Act is there sanction for an invasion of the liberties guaranteed to all citizens by the First Amendment.

NLRB v. *Ford Motor Co.*, 114 F.2d 905, 914 (6th Cir.), *cert. denied*, 312 U.S. 689 (1940).[52] Rather, First Amendment rights are basic tenets of federal labor policy. *Letter Carriers* v. *Austin*, 418 U.S. 264 (1974); *Southwire Co.* v.

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[51] Increasingly, the courts are recognizing that beliefs and scruples may be held not only by individuals but by associations and institutions. *See Chrisman* v. *Sisters of St. Joseph of Peace*, 506 F.2d 308, 312 (9th Cir. 1974). *See also, Brown* v. *Dade Christian Schools, Inc.*, 556 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1063 (1978); *Taylor* v. *St. Vincents Hosp.*, 523 F.2d 75 (9th Cir. 1975); *Doe* v. *Bellin Memorial Hosp.*, 479 F.2d 756, 759-60 (7th Cir. 1973); *Watkins* v. *Mercy Medical Center*, 364 F. Supp. 799, 803 (D Idaho 1973); *Allen* v. *Sisters of Saint Joseph*, 361 F. Supp. 1212 (N.D. Tex. 1973), *app. dism'd*, 490 F.2d 81 (5th Cir. 1974). This Court, too, has recognized the existence of an institional conscience, when it noted that a "conscience" clause, provisions in a Georgia criminal abortion statute permitting physicians and hospitals to refrain from participating in abortions, "obviously are in the statute in order to afford appropriate protection to the individual and *to the denominational hospital.*" *Doe* v. *Bolton*, 410 U.S. 179, 198 (1973). (emphasis supplied).

[52] Manifestly, if an LMRA violation be found, the ILA will be denied the right—enjoyed by every other segment of society, from corporations to consumers—to protest and disassociate itself from the Soviet aggression by refusing to do business as usual.

NLRB, 383 F.2d 235 (5th Cir. 1967).[53] They may not be defeated by narrow or strained construction by the Board or employers. *Montgomery Ward & Co.* v. *NLRB*, 385 F.2d 760 (8th Cir. 1967); *NLRB* v. *Howard Qarries, Inc.*, 362 F.2d 236 (8th Cir. 1966).

The First Circuit and the NLRB adopt the expedient of deciding this case under the labor law without reference to the inextricable First Amendment dimensions and then facilely concluding that the Constitution does not protect conduct they have already found to be unlawful. By couching their discussion in constitutionally neutral language (the "political" dispute becomes "non-labor" or "primary," the conscientious absention, "refusal to handle"), both tribunals create the facade of a secondary boycott divorced from the realities of the union conduct.[54]

This case is not the usual situation where a union's aim is clearly economic but the First Amendment is invoked because the means employed consists of activity which usually warrants constitutional protection. There the issue is whether the union is genuinely engaged in communicative activity or is using communication as a guise to achieve, for

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[53] The First Circuit's justification for permitting the §8(b)(4) charges to curtail First Amendment rights, that the "union and its members have numerous alternative forms of internal 'expression' left to them," 640 F.2d at 1378-79, 22a, is in direct conflict with decisions of this Court that infringement of freedom of expression may not be justified on the ground that alternative means of communication are open. *See, e.g. Schneider* v. *Irvington*, 308 U.S. 147 (1939).

[54] In the course of their analyses, the court of appeals and the Board also forget that the very characteristics of petitioners' conduct which they rely on to find both jurisdiction and an a fortiori violation of the LMRA are those which invoke the protection of the First Amendment. The First Circuit permits bifurcation of the domestic from the foreign effects precisely because the latter is a non-labor—i.e., a *political*—dispute. The inference of an unlawful object is permitted because it is alleged that the effects on third parties flow inevitably from the protest itself.

an economic objective, an unlawful purpose. This was the situation in all of the cases relied on by the First Circuit and the Board. 640 F.2d at 1378-79, 22a-24a; J.A. at 30a-31a;[55] *see also, Mobile*, 419 U.S. at 229-32. It is clear that First Amendment means will not legalize activity which is inherently unlawful. *International Brotherhood of Electrical Workers* v. *NLRB*, 341 U.S. 694 (1951). But even there a delicate balancing is required between the free flow of commerce and the right of expression. *Mobile*, 419 U.S. at 228-32.

But here, where the union has no economic purpose and its conduct is exclusively to exercise protected rights, these considerations do not apply. No one has even suggested that the ILA is protesting over Afghanistan in order to get at Allied, Waterman or Clark. The present situation is admittedly rare. But every court prior to the First Circuit in this case has agreed that the First Amendment purpose protects even activity which, if done for economic ends, might be unlawful. *Ocean Shipping*, 332 F.2d at 992;[56] *Danielson*, 411 F. Supp. at 655; *Walsh*, 630 F.2d at 864.

It should be noted that three of the four circuits on whose dictum the First Circuit and the Board rely for the proposition that a primary labor dispute is not necessary for a violation of §8(b)(4) have suggested that the pres-

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[55] The Fifth Circuit's dictum in *New Orleans S.S. Ass'n* v. *General Longshore Workers, ILA*, 626 F.2d 455, 463 (5th Cir. 1980), likewise contemplated an attempt to sanitize otherwise lawful activity by invoking the First Amendment.

[56] Unlike the case at bar, *Ocean Shipping* involved a deliberate, not an unavoidable, involvement of others in the union's protest,—a blacklist of any ship that had been used in the Cuban trade. Still, the court held that the longshoremen's mere declining "to accept employment aboard a ship deemed tainted by having engaged in Cuban trade" could not be said to be secondary in object. *Id.* at 997. In the case at bar, there is no element of blacklist or reprisal, but only a naked refusal of longshoremen themselves to become involved.

ence of a *political* dispute would protect the activity.[57] Recently, the District of Columbia Circuit, which in *National Maritime Union* v. *NLRB*, 346 F.2d 411 (D.C. Cir.), *cert. denied*, 382 U.S. 840 (1965), had declined to follow *Ocean Shipping*, said

> When the courts have drawn boundaries around the area of 'labor disputes,' they have done so *only to exclude from that category controversies in which a union acts out of a political interest* which it may share with all other citizens and which in no way enhances the distinct economic interests of its members. *NLRB* v. *Int'l Longshoremen's Ass'n, supra* n.10, 332 F.2d at 996 (stevedores express position on Cuban missile crisis by refusing to load any ship involved in trade with Cuba).

Soft Drink Workers Union v. *NLRB*, 90 LC 26,066, 26,081 n.11 (D.C. Cir. 1980). (emphasis supplied).

Thus, even those courts who would not say that a primary labor dispute is always necessary for a violation of §8(b)(4) would not go so far as to apply the LMRA where the dispute was political.[58] Similar First Amendment considerations have motivated the courts which have declined to apply the antitrust laws to boycotts not prompted by

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[57] The Second Circuit in *National Maritime Union* v. *NLRB*, 342 F.2d 538 (2d Cir.), *cert. denied*, 382 U.S. 835 (1965) expressly distinguished *Ocean Shipping* in that there "the cause of the work stoppage was purely political." *Id.* at 542. The Eighth Circuit in *NLRB* v. *Twin City Carpenters Dist. Council*, 422 F.2d 309 (8th Cir. 1970) stated that the charges before the court "relate[d] to no political dispute." *Id.* at 312. *See also, Mountain Navigation Co.* v. *Seafarers Int'l Union*, 348 F. Supp. 1298, 1303 (W.D. Wis. 1971), where a district court distinguished *Ocean Shipping* because the controlling factor there was the union's political animus.

[58] The First Circuit in this case carefully avoided using the terms "political" or "conscientious" (with their inevitable constitutional connotations) to describe the ILA's conduct. However, the activity in this case was *not* economic precisely because it *was* political and conscientious.

economic aims (*see* pp. 30-31 above).[59] This Court, noting the trend to limit the antitrust laws to economically motivated activity, has pointed out

> [t]he possible constitutional infirmity in the antitrust laws that a contrary construction would entail in light of the *serious threat to First Amendment freedom* that would be presented.

Lafayette v. *Louisian Power & Light Co.*, 435 U.S. 389, 399-40 n.17 (1978). (emphasis supplied). *See also, Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961).

The same principle should apply where the constitutionally protected activity allegedly violates the labor law. Nothing in the history of the LMRA indicates an intent by Congress that it should be used to frustrate what is plainly expressive and conscientious conduct. To make such use of the LMRA, no less than the antitrust laws, would far surpass the will of Congress and violate the First Amendment.

The constitutional antagonism is all the more apparent when one considers the conscientious dimension of petitioners' conduct. Not only is the political and expressive *end* protected, the *means* employed—the mere refusal to participate in activity perceived to be morally wrong—falls within the First Amendment's protection. Like other

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[59] In all the antitrust cases previously cited, where all the elements for the finding of a technical violation of the Sherman Act were presented, the courts might easily have taken an approach like the First Circuit's here and mechanistically construed a violation to which they then declined to give constitutional protection. However, once they perceived a genuine First Amendment motive, they properly refused to find a violation on the grounds that political activity was simply not what the antitrust laws were designed to regulate and that the statute's use for such purpose would violate the First Amendment. *See also Henry* v. *First Nat'l Bank of Clarksdale*, 595 F.2d 291 (5th Cir. 1979); *Machesky* v. *Bizzell*, 414 F.2d 283 (5th Cir. 1969).

courts[60] the First Circuit recognized the "limited scope" of the ILA's conduct. 640 F.2d at 1380, 26a. Unlike *Ocean Shipping* and the boycott cases, the union's response here was strictly limited to what conscience demanded—the refusal to handle the morally repugnant work. There can be no charge here that petitioners' conduct was "conscience plus." "The case . . . does not involve an allegation that First Amendment rights were used to achieve substantive evils. Rather, the claim is that the allegedly protected conduct *is* the substantive evil." [61]

It was never the intent of Congress to "strain through the filament" of the LMRA difficult and sensitive issues of political expression and conscience. This would abandon this Court's consistent approach to the Act. Just as in the *Benz/Windward* line the Court has refused, without express direction from Congress, to make the Act a tool for resolving foreign disputes, so, too, it has, without congressional mandate, refused to intrude the Act into the area of religious freedom. *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490 (1979). To permit the LMRA to become the vehicle to frustrate a genuine attempt to exercise constitutionally guaranteed liberties would be a perversion of the statute.

The intrusion of the National Labor Relations Board reinforces the argument. The Board has no expertise in and was never intended to be the arbiter of matters of politics or conscience. Especially where, as here, the protected activity cannot be separated from its effects, to engraft the LMRA onto an essentially non-labor situation would be to give the NLRB a *de facto* veto over political and conscienti-

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[60] The ILA's objective in the instant case is to voice a political protest against the U.S.S.R. by refusing to handle cargo bound for that country. *It has taken no steps to broaden that specific and limited objective.*

Baldovin v. *International Longshoremen's Ass'n*, 626 F.2d 445, 452 (5th Cir. 1980). (emphasis supplied).

[61] *Crown Cent. Petroleum Corp.* v. *Waldman*, 486 F. Supp. 759, 766 n.8 (M.D. Pa. 1980). (emphasis in the original).

ous conduct. Nor can the NLRB undertake the strict scrutiny to which this Court has insisted governmental regulation impinging on First Amendment rights must be subject.[62] *Kusper* v. *Pontikes*, 414 U.S. 51 (1973); *Williams* v. *Rhodes*, 393 U.S. 23 (1968); *United Public Workers* v. *Mitchell*, 330 U.S. 75 (1946); *Amalgamated Transit Union* v. *Suscy*, 538 F.2d 1264 (7th Cir. 1976). The constitutional mischief of permitting an agency of the government to resolve political and conscientious controversies is self-evident.[63]

IV.

Summary Judgment Should Not Have Been Granted.

Even if it should be held that the First Circuit was correct in its view of the law, it erred when it purported to grant summary judgment. Although the court of appeals was technically correct in treating the motion to dismiss as one for summary judgment because matters beyond the pleadings were considered, to do so in this case was fundamentally unfair. Affidavits were submitted to the district court

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[62] The Board's approach in the present case proves the point. In its 38-page opinion, the First Amendment is given a single footnote. J.A. at 30a n.8. The administrative law judge devoted to the constitutional issue one sentence out of 69 pages.

[63] A refusal to apply the LMRA in this case in no way contemplates the use of First Amendment claims to ride roughshod over the rights of others. The remedies of state court are available. The list of values to be considered in a private tort action, enumerated in Judge Aldrich's dissent, 640 F.2d at 1384, 35a, attests to how much more suitable a forum the state court would be: the nature of the actor's conduct, the actor's motive, the interests sought to be advanced by the actor and the social interests at issue. Resolution of these issues is far more appropriate to an unbiased trier of fact than to an administrative agency trying to squeeze the case into the mold of its particular statute.

only on the question of the preliminary injunction.[44] Because the district court granted the motion to dismiss on the basis of its prior decision in *Walsh*, the ILA was never given a day in court to address the merits of Allied's § 303 case. The unfairness is compounded because, even as the record stands, triable issues of fact are presented which preclude summary judgment. *Associated Press* v. *United States*, 326 U.S. 1, 6 (1945).

The question of the union's object or intent is paramount to an 8(b)(4) violation. Even if such intent could be inferred from the necessary and foreseeable effects of the conduct, petitioners are entitled to have a trier of fact weigh the circumstantial evidence on which Allied relies in the light of all the evidence. Other courts have pointed to evidence which suggests the union had no purpose to influence others. Questions of object or intent are particularly inappropriate for determination on a motion for summary judgment. *Romero* v. *Union Pacific Railroad*, 615 F.2d 1303 (10th Cir. 1980); *Foster* v. *Swift & Co.*, 615 F.2d 701 (5th Cir. 1980).

Moreover, before the First Circuit's inference from foreseeable consequences can even be applied, there are triable issues as to whether the ILA refusal would have the inevitable consequences the court of appeals suggests.[45] Sim-

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[44] On the §303 count, petitioners' sole ground was legal argument —that the decision in *Walsh*, with which this case had been consolidated, was the law of the case. J.A. at 49a, 50a. The district court recognized that the Gleason affidavit was more in the nature of a brief. Transcript of Hearing, at 21. The limited factual information submitted by petitioners was to defeat Allied's motion for a preliminary injunction based on its antitrust and tort claims, to which the earlier ruling had not applied. J.A. at 53a, 54a.

[45] These go to the availability of other ports, J.A. at 14a, 37a, 61a, and of other labor, given the facts (1) that Clark's contract permitted the use of non-ILA labor where the union was unwilling to work, S.M. at 5a; (2) that in other instances petitioner had not interfered with the unloading of a Russian ship by nonunion labor, J.A. at 62a, 63a; and (3) that non-ILA labor might have been willing to work.

ilarly, the First Circuit should not without a trial have rejected the union's claim to exercise its members' constitutional rights of expression and conscience.[46]

Thus, even if this Court should affirm on the law, it should hold no more than that a claim under § 8(b)(4) has been pleaded. It should reverse the judgment of the court of appeals and direct a trial to determine whether the allegations of the complaint can be proved.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Dated: November 19, 1981

Respectfully submitted,

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[46] If there be any doubt as to the attitude of rank and file longshoremen or the character of the International's position, petitioners are entitled to submit evidence on these issues to a trier of fact before First Amendment rights are facilely swept aside. See p. 35, n.47 below.

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In the Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, Local 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, and T.W. GLEASON, Individually and as he is President of International Longshoremen's Association, AFL-CIO and H.R. HASSELGREN, Individually and as he is Secretary-Treasurer of International Longshoremen's Association, AFL-CIO and N.J. BOWERS, Individually and he is Executive Vice President of International Longshoremen's Association, AFL-CIO and F.R. FIELD, JR., Individually and as he is General Organizer of International Longshoremen's Association, AFL-CIO and A. SCOTTO, Individually and as he is Regional Director of International Longshoremen's Association, AFL-CIO and J.T. MOOCK, Individually and as he is First Vice President of International Longshoremen's Association, AFL-CIO and R.A. MASSEY, Individually and as he is Second Vice President of International Longshoremen's Association, AFL-CIO and G.W. DIXON, Individually and as he is Third Vice President of International Longshoremen's Association, AFL-CIO and W.P. LYNCH, Individually and he is Fourth Vice President of International Longshoremen's Association AFL-CIO,

PETITIONERS,

v.

ALLIED INTERNATIONAL, INC.,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT

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I

Question Presented

Whether union conduct which would constitute an unlawful secondary boycott if undertaken for the purpose of advancing the employment related interests of American workers is legitimized when the conduct is intended to protest the foreign policy of another country in circumstances where the means of the protest could reasonably be expected to threaten neutral American employers with ruin or substantial loss?

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In the
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OCTOBER TERM, 1981

No. 80-1663

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, Local 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, and T.W. GLEASON, Individually and as he is President of International Longshoremen's Association, AFL-CIO and H.R. HASSELGREN, Individually and as he is Secretary-Treasurer of International Longshoremen's Association, AFL-CIO and N.J. BOWERS, Individually and he is Executive Vice President of International Longshoremen's Association, AFL-CIO and F.R. FIELD, JR., Individually and as he is General Organizer of International Longshoremen's Association, AFL-CIO and A. SCOTTO, Individually and as he is Regional Director of International Longshoremen's Association, AFL-CIO and J.T. MOOCK, Individually and as he is First Vice President of International Longshoremen's Association, AFL-CIO and R.A. MASSEY, Individually and as he is Second Vice President of International Longshoremen's Association, AFL-CIO and G.W. DIXON, Individually and as he is Third Vice President of International Longshoremen's Association, AFL-CIO and W.P. LYNCH, Individually and he is Fourth Vice President of International Longshoremen's Association AFL-CIO,

PETITIONERS,

v.

ALLIED INTERNATIONAL, INC.,[1]

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENT

[1] Allied International, Inc.'s subsidiary and its affiliated corporations are set forth at page 1 n.1 of Allied's Response to Petition for Writ of Certiorari in this case.

Introduction

Respondent submits this brief pursuant to Rules 34(2) and 35(2) of the Rules of this Court in response to the brief filed by petitioners.[2]

Statutory Provisions Involved

The relevant statutory provisions include Sections 8(b)(4) and 303 of the Labor Management Relations Act, 1947 (hereinafter cited as the "Labor Management Relations Act" or the "LMRA"), 29 U.S.C. §§ 158(b)(4) and 187. The pertinent parts of these statutes are reproduced in the ILA's petition for certiorari at pp. 2-3. The relevant statutory provisions also include Section 2(6) and (7) of the National Labor Relations Act as amended (hereinafter cited as the "National Labor Relations Act" or the "NLRA"), 29 U.S.C. § 152(6) and (7), and Section 501(1) and (3) of the Labor Management Relations Act, 29 U.S.C. § 142(1) and (3). The pertinent parts of these statutes are reproduced in the Appendix to this brief.

Statement of the Case

The procedural posture of this case can be best understood if considered in conjunction with the development and pending status of NLRB Case No. I-CC-1753, which on August 28, 1981 resulted in a Decision and Order of the National Labor Relations Board (hereinafter "NLRB") reported at 257 NLRB No. 151, S.M. at 1a *et seq.* This broader view is necessary in light of the parties' evident disagreement, as addressed at pp. 6-7 *infra*, over the exact current status of the instant case. Both the instant case and NLRB Case No. I-CC-1753 arise out of the same facts and, insofar as relevant to this petition for writ of certiorari, involve the same legal issues.[3]

---

[2] Petitioners will hereafter be referred to in this brief as the "ILA" or the "union", and respondent will be referred to as "Allied". References to various appendices shall conform to the form adopted by the ILA at p. 1 n. 1 of its brief, i.e., references to the appendices to the Petition for a Writ of Certiorari herein are designated: "__ a", to the Joint Appendix: "J.A. at ____" and to the appendix to the Supplemental Memorandum for the United States as Amicus Curiae: "S.M. at ____".

[3] The ILA's petition for certiorari in this case involves only the count of Allied's complaint alleging that the ILA's Russian boycott violated § 303 of the LMRA. This count raises the same legal issues as NLRB Case No. 1-CC-1753. *See* n.5 *infra*. Allied's cross-petition for certiorari (No. 80-1906) with respect to its admiralty tort and antitrust counts, which raise other legal issues, is still pending before this Court.

The court of appeals below found the basic facts giving rise to this case to be as follows:

> Allied International, Inc. is an importer of Russian wood products, which has contracted with two agencies of the USSR for the purchase of birch hardwood and plywood. Allied has also contracted (through a third Soviet agency) with Waterman Steamship Co. for the shipment of these wood products to the United States from the USSR. Waterman employs John T. Clark & Son, a stevedoring company, to unload its ships docking in Boston. Clark's initial source of longshoremen is a hiring hall, operated by defendants International Longshoremen's Association (ILA) and its Local 799 pursuant to a collective bargaining agreement between the unions and the Boston Shipping Association.
>
> On January 9, 1980, one of Waterman's ships, the *Walton*, was in Boston unloading a portion of Allied's plywood and hardwood, prior to further unloading at other ports along the East Coast. On that date, defendant Thomas Gleason, President of the ILA, ordered ILA members to cease handling cargoes bound for or arriving from the Soviet Union, in protest of the invasion of Afghanistan by Soviet armed forces.[4] In response to Allied's inquiries, Gleason informed Allied that ILA members would unload the *Walton's* cargo in Boston, but not at any other United States port. As a result, Waterman cancelled the *Walton's* scheduled calls, and unloaded all of Allied's wood products cargo in Boston, where it was stored, accruing demurrage and security charges. Waterman also restricted the cargo then being loaded into the *Middleton* in Leningrad to one-third its scheduled size, cancelled its delivery to scheduled United States

[4] The text of Mr. Gleason's order is omitted. It can be found at 3a, J.A. at 11a, and S.M. at 3a-4a, 45a.

ports, and unloaded the wood products in Montreal. In addition, Waterman repudiated its agreement to transport Allied's wood products aboard the *Jefferson*, which had not yet been loaded. ILA and Local 799 representatives informed Allied on March 12 and March 25, 1980 that no ILA members would unload any cargo originating in the USSR. 2a-3a, 640 F.2d at 1369-1370, J.A. at 32a-47a.

As a result of Mr. Gleason's order, Allied lost the great bulk of its twenty-five million dollar a year business of importing wood from Russia. J.A. at 24a-28a, 38a.

Confronted by these facts, Allied in March of 1980 filed two actions. First, pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), it filed an unfair labor practice charge, NLRB Case No. I-CC-1753. It also filed the complaint in the United States District Court for the District of Massachusetts giving rise to this case alleging (1) that the ILA's conduct violated Section 303[5] of the Labor Management Relations Act (2) that it was a tort cognizable in admiralty and (3) that it violated the Sherman Act. J.A. at 6a-20a.

Pursuant to Section 10(b) and 10(1) of the NLRA, the NLRB's Acting Regional Director issued an unfair labor practice complaint against the ILA and filed a request for preliminary injunctive relief in the United States District Court for the District of Massachusetts. This request was denied by the district court in *Walsh* v. *ILA*, 488 F. Supp. 524 (D. Mass. 1980) on the ground that the ILA's conduct was not secondary and therefore did not violate Section 8(b)(4). The Acting Regional Director appealed this denial to the United States Court of Appeals for the First Circuit. In *Walsh* v. *ILA*,

[5] Section 303 of the LMRA grants a right to sue for damages in federal district court to a party injured in his business or property by reason of union conduct violating § 8(b)(4) of the NLRA. Thus, the legal and factual issues raised in the NLRB unfair labor practice case and in the first count of Allied's complaint in this case are identical. As discussed in more detail at pp. 11-12 *infra*, the NLRA is Title I of the LMRA.

630 F.2d 864 (1st Cir. 1980), the circuit court vacated the district court's determination but remanded with instructions to dismiss the Acting Regional Director's injunction request on the ground that since the NLRB, and not its individual regional director, was in substance the real petitioner in a Section 10(1) proceeding, the dismissal of a Section 10(1) petition attacking the ILA's Russian boycott in an earlier filed case in another district[6] was *res judicata* to the injunction request.

Meanwhile, in August, 1980 the Acting Regional Director's complaint was tried in two days of hearing on the merits before NLRB Administrative Law Judge, Bernard Ries. On March 16, 1981, Judge Ries issued a decision in which he made all "factual and inferential findings which would be necessary or useful in further processing" of the case but concluded that the complaint should be dismissed for want of jurisdiction largely upon the rationale of *Baldovin* v. *ILA*, 626 F.2d 445 (5th Cir. 1980). S.M. at 43a *et seq*. Judge Ries' decision was appealed to the Board by both Allied and the Board's General Counsel, and on August 28, 1981 the Board issued its Decision and Order reversing Judge Ries and finding that the ILA's conduct violated Section 8(b)(4). S.M. at 1a-42a.

Meanwhile, Allied's second legal challenge to the ILA's boycott, its three count federal district court complaint in this case, was also proceeding. On June 17, 1980, the district court granted an ILA motion for summary judgment dismissing all three counts of Allied's complaint. The district court's Memorandum and Order is reproduced at Appendix C to the ILA's petition for certiorari in this case. Allied appealed, and on January 6, 1981 the court of appeals reversed the grant of summary judgment on the Section 303 count,[7] but sustained

[6] *Baldovin* v. *ILA*, Civil No. 80-259 (S.D. Tex. Feb. 15, 1980), *aff'd*, 626 F.2d 445 (5th Cir. 1980).

[7] *Baldovin* v. *ILA* was not *res judicata* to this case because the parties to this case were Allied and the ILA rather than the NLRB, acting through a regional director, and the ILA. 4a-51, 640 F.2d at 1370.

it on the other two counts. 1a *et seq.* The ILA petitioned for certiorari on the issue of the court of appeal's reversal of the district court's grant of summary judgment on the Section 303 count, and this Court granted that petition on October 5, 1981.

Based on all of the above, this case is before this Court in a unique procedural posture. Considered in terms of only the formal record, it is merely in the common procedural posture of a court of appeal's reversal of a district court grant of a motion for summary judgment. On the other hand, considered in conjunction with the proceedings in NLRB Case No. I-CC-1753, the instant case has the added uncommon twist that many factual issues have already been resolved after a trial on the merits involving the same parties — which findings may collaterally estop both Allied and the ILA. *See H.L. Robertson & Assn.* v. *Plumbers Local Union No. 519*, 429 F.2d 520 (5th Cir. 1970); *Paramount Transport Systems* v. *Teamsters Local 150*, 436 F.2d 1064 (9th Cir. 1971); *Consolidated Express, Inc.* v. *New York Shipping Ass'n*, 641 F.2d 90 (3d Cir. 1981). However, consideration of this collateral estoppel question may be premature since the ILA has not yet had an opportunity to contest the NLRB's factual findings on the ground that they were not supported by substantial evidence on the record as a whole.[8]

In view of the foregoing, the ILA's argument at pp. 43-46 of its brief to the effect that the court of appeals below should not have granted Allied summary judgment and that, even if Allied prevails on the law, this Court should direct a trial on the merits is misplaced. As much as Allied may wish that the court below had granted it summary judgment, the fact remains that it did not do so. Rather, it vacated the district

[8] Petitions to review the Board's Decision and Order pursuant to § 10(f) of the NLRA, 29 U.S.C. § 160(f), were filed by both the ILA and Allied, and they are now pending before the United States Court of Appeals for the District of Columbia as Case Nos. 81-1974 and 81-2100, respectively. On October 30, 1981, that court of appeals, upon motion of the NLRB, stayed further processing of these review petitions until after the decision of this Court in the instant case.

court's grant of summary judgment to the ILA on Count I of Allied's complaint and remanded to the district court for further consideration of Allied's prayer for damages and injunctive relief. 24a, 640 F.2d at 1379. Accordingly, if this Court affirms the court of appeals below on the law, it should also affirm that court's remand to the district court. The district court then can decide any issues that may arise as to whether Allied should be granted summary judgment as to liability because the pleadings and/or affidavits in the record show that there are no contested relevant facts and/or because of the collateral estoppel effect of factual determinations in NLRB Case No. I-CC-1753.[9]

Summary of Argument

A classic "hot cargo" type of secondary boycott in violation of the National Labor Relations Act and the Labor Management Relations Act occurs when union leadership representing employees of employer A orders those employees to refuse to handle product produced by, destined for or otherwise related to B because of a dispute that union or its leadership has with B. That the underlying dispute with B is political rather than economic and that this dispute is about an action taken by B outside of the United States rather than within its boundaries should not alter this result. Thus, the ILA leadership's act of ordering American longshoremen employed by American stevedore firms to refuse to load cargoes to or from Russia because of a disapproval of the Russian invasion of Afghanistan should be held to be an illegal secondary boycott, particularly since it resulted in a substantial disruption of international trade.

[9] While not conceding that these facts would be relevant even if proved, Allied notes that the ILA has already attempted and failed in NLRB Case No. I-CC-1753 to prove at a trial on the merits the very facts it asserts on pp. 35, 44 & 45 n.47, 65 & 66 of its brief that it wishes to attempt to prove in this case. S.M. at 2a, 4a-6a, 28a-30a, 32a-33a and 47a-52a.

There is nothing in the plain language of the NLRA Section 8(b)(4) proscriptions against union secondary boycotts or in any other provision of the LMRA that requires either a non-political primary dispute or an American situs of a primary dispute before an American secondary boycott can be proscribed.

The proscription of such a secondary boycott is required by the purposes of Section 8(b)(4). The Wagner Act of 1935, and other federal legislation specially benefiting labor unions, gave unions unique monopoly-like powers possessed by no other kinds of organizations in American society. Concerned about abuses of these powers that unduly injured the public without providing any benefits essential to workers, Congress in 1947 enacted the LMRA, including its proscriptions against secondary boycotts. The fundamental purposes of these secondary boycott proscriptions were to protect a union's right to exercise these special monopoly-like powers against the employer of the workers represented by that union for the primary object of improving the terms and conditions of employment of those workers, but to shield unoffending employers and others from the use of these powers for more remote objects. *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951). Thus, the more remote a union's object from the wages, hours, and terms and conditions of employment of the workers ordered by that union not to work, the more compelling is the reason for application of the proscriptions of Section 8(b)(4).

Nothing in *American Radio Association* v. *Mobile Steamship Association*, 419 U.S. 215 (1979) or any other of this Court's "foreign-flag ship cases" prevents Section 8(b)(4) from applying to the ILA's Russian boycott. The foreign-flag ship cases, and the comity considerations upon which they are predicated, are concerned only with situations where the union's conduct occurs in proximity to a foreign ship with a foreign crew in an American port and is a direct effort to impose American regulations and standards upon that foreign

ship and its crew. These cases do not reach a situation where the union's harmful conduct in America arises out of its objection to the conduct of a foreigner in a pre-existing foreign dispute, let alone reach a situation where the union's objection is to the cargo carried by the ship rather than any aspect of the ship itself. Moreover, a comity problem can only arise in a situation where the union's conduct may be arguably protected by Section 7 of the NLRA, 29 U.S.C. § 157, and thus cannot exist in this case where there is no such arguable protection.

There is no substantial First Amendment interest involved in this case. The issue in this case is the right of union leaders to order secondary boycotts, not the right of individual workers to refuse to do work they find unconscionable. Moreover, the kind of "conscience" interest asserted is essentially political rather than conscientious. *Gillette* v. *United States*, 401 U.S. 437, 455 (1971). In any event, any residual First Amendment interest that may be involved is overwhelmingly outweighed by the legitimate need to protect the economy and the national interest against the kind of massive trade disruption and damage to foreign relations that occurred as a result of the ILA's Russian boycott.

Argument

A Union President's Directive To Union Members To Refuse To Handle Product Of A Foreign Nation Because Of Union Disapproval Of A Foreign Policy Act Of That Nation Violates The Labor Management Relations Act, 1947.

A. *Introduction*

The National Labor Relations Board, the agency entrusted with the responsibility for administering and interpreting the

complex secondary boycott provisions of the NLRA,[10] has succinctly described the ILA's Russian boycott as "conduct classically subject to and violative of Section 8(b)(4) of the National Labor Relations Act. . . ." S.M. at 1a. The Board stated:

> It is difficult to imagine a situation that falls more squarely within the scope of Section 8(b)(4) than the one before us today. Here, the Union's sole dispute is with the USSR over its invasion of Afghanistan. Allied, Waterman, and Clark have nothing to do with this dispute. Yet the Union's actions in furtherance of this disagreement with Soviet foreign policy have brought direct economic pressure on all three parties and have resulted in a substantial cessation of business. Thus, the conduct alleged in this case is precisely the type of conduct Congress intended the National Labor Relations Act to regulate. S.M. at 14a.

As pointed out by the court below, the ILA's conduct is a typical "hot cargo" secondary boycott, i.e., a refusal to handle the product of the entity with whom the union has its primary dispute. 15a-16a, 640 F.2d at 1375. Stated otherwise, if Allied's wood had come from trees cut by non-union lumberjacks in South Carolina rather than from Russian trees and if ILA President Gleason had ordered that this South Carolina wood not be handled because it came from trees cut by non-union lumberjacks, the union's action would undoubtedly have violated Section 8(b)(4) of the Act.

The central questions posed by this case are thus whether there are any compelling reasons why the result should be different solely because the primary dispute between the ILA and the Soviet Union was a political dispute rather than a labor dispute or solely because the locus of the Soviet act giving rise to that primary dispute (Afghanistan) was overseas rather

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[10] *Local 761, International Union of Electrical Workers* v. *NLRB*, 366 U.S. 667, 674 (1961); *NLRB* v. *Retail Store Employees, Local 1001, (Safeco)*, 447 U.S. 607, 100 S.Ct. 2372, 2377 n.11 (1980).

than on American soil. Allied submits that an analysis of the language and purpose of the Labor Management Relations Act of 1947 discloses no reasons why these factual variations should dictate a different result.

B. *The Political Nature of the Union's Ultimate Object Should Not Affect the Result*

Neither the language nor the purpose of the Labor Management Relation Act limits the application of its secondary boycott prohibitions[11] to "labor disputes", as defined in that Act, or otherwise prevents those provisions from applying to secondary union conduct arising out of a primary dispute over a political or any other kind of matter.

The Labor Management Relations Act constituted a massive change and expansion in the scope of defined obligations of labor unions. The provisions of the simpler National Labor Relations Act of 1935, commonly known as the Wagner Act, were almost exclusively devoted to conferring rights upon labor unions and employees. The LMRA significantly rewrote the Act to provide that various types of union conduct, including secondary boycotts, constituted unlawful activity subject to control by the NLRB and the courts. Moreover, the entire National Labor Relations Act as so amended was relegated to being but Title I in the new five Title comprehensive LMRA scheme. Two of the other four Titles also further substantially restricted certain kinds of union conduct.[12]

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[11] The plain language of the relevant portions of these statutes is set forth at pp. 2-3 of the ILA's petition for certiorari.

[12] Portions of Title II gave the President rights in the event of national emergency strikes, § 206 *et seq.*, 29 U.S.C. § 176 *et seq.*, while portions of Title III gave employers rights to sue for union breach of collective bargaining agreements, § 301, 29 U.S.C. § 185, prevented union representatives from receiving certain kinds of payments from employers, § 302, 29 U.S.C. § 186, created the right to sue unions for secondary boycott damages at issue in the instant case, § 303, restricted union political expenditures, § 304, 2 U.S.C. § 251 and made strikes by government employees unlawful, § 305, 29 U.S.C. § 188.

While the term "labor dispute" is defined in both the LMRA and its NLRA component, 29 U.S.C. §§ 142(3) and 152(9), there is nothing that either limits all provisions of the LMRA to cases falling within that definition or that limits the statutory secondary boycott provisions at issue to such cases. In fact, when Congress saw fit to so limit the Act, it did so by specific statutory language. *See e.g.*, Section 203(a), 29 U.S.C. § 173(a), which sets forth the functions of the Federal Mediation and Conciliation Service. On the other hand, all of the LMRA cannot be subject to the "labor dispute" definition. The application of that limitation to provisions such as Section 304, which regulated political campaign contributions, makes no sense whatsoever. While Allied is aware of no cases in point on the question, Allied cannot imagine that Section 305, or its successor statutory provisions, would be construed so as to exclude from coverage strikes for political objectives by federal government employees.[13] Most significantly, this Court, in *United Assoc. of Journeymen & Apprentices of the Plumbing & Pipefitting Industry* v. *Local 334, Plumbers*, ____ U.S. ____, 101 S.Ct. 2546, 2551 (1981), recently held that Section 301 of the LMRA covered a dispute that was not only not a "labor dispute", but also was not even a dispute with any foreseeable "impact on labor management relations or industrial peace." This Court premised its holding upon the plain language of the statute and the lack of any legislative history negating that plain language. This Court also relied on the rationale that LMRA jurisdiction would "contribute to the achievement of labor stability." 101 S.Ct. at 2550-2551. Thus, where, as here, the plain language of the statute also covers the dispute without such coverage being negated by any

[13] Section 304 amended § 313 of the Federal Corrupt Practices Act, 1925, 2 U.S.C. § 251, and later became § 610 of the U.S. Criminal Code, 18 U.S.C. § 610, which was repealed by Pub.L. 94-283, Title II, § 201(a), 90 Stat. 496 (1976) and transferred to § 321 of the Federal Election Campaign Act of 1976, 2 U.S.C. § 441(b). Chapter 690 of the Acts of 1955, § 4, 69 Stat. 625 (1955) repealed 29 U.S.C. § 188 and transferred its substantive and remedial provisions as expanded into 5 U.S.C. §§ 3333 and 7311 and 18 U.S.C. § 1918.

legislative history, LMRA coverage would contribute to the achievement of labor stability and the dispute obviously does have an impact upon labor-management relations and industrial peace, there *a fortiori* must be coverage.[14]

The conclusion that obligations imposed by the LMRA on unions are intended to reach beyond the labor dispute definition, unless specifically precluded in a specific provision from doing so, is further fortified by the fact that the LMRA and NLRA definitions of "commerce", "affecting commerce" or "industry affecting commerce" either do not mention the term "labor dispute" or, even more significantly, list it as but one disjunctive element of the definition. *See* Section 2(6) of the NLRA (no listing) and Section 2(7) of the NLRA and Section 501(1) of LMRA (disjunctive listings). The text of these provisions is in the Appendix to this brief. Additionally, the Short Title and Declaration of Policy of the LMRA, 29 U.S.C § 141, mentions "labor dispute" only in connection with one of its many clauses setting forth the purposes and policies of that Act, and the Section I "Findings & Policies" of the NLRA, 29 U.S.C. § 151, nowhere mentions "labor dispute". Finally, the LMRA Section 501(2), 29 U.S.C. § 142(2), definition of the term "strike", which is inherently involved with Section 8(b)(4) secondary boycott cases, contains no "labor dispute" limitation.[15]

The conclusion that the ILA's political objective does not transmute an otherwise routine secondary boycott into a primary strike or for any other reason deprive the public and innocent neutrals of their normal rights to injunctive and damage relief is also consistent with the purpose of Section

[14] The close relationship of § 303 to § 301 is signified by the fact that § 303(b) incorporates the procedural provisions of § 301.

[15] "The term strike includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees." 29 U.S.C. § 142(2).

8(b)(4) — particularly as viewed in the context of the history of American labor relations and labor law. Labor unions are unique kinds of organizations. By virtue of statutes such as the National Labor Relations Act, labor unions were granted extensive and unique monopoly-like rights not accorded business, political, social or other kinds of associations or organizations.[16] These rights are the foundation of the power that is today exercised on a national or major regional basis by the ILA and other large and wealthy international unions — including the rights and powers to disrupt commerce and injure innocent third parties through strikes and other work stoppages. It is submitted that American history establishes that these rights and powers were uniquely granted unions so that they could improve the wages, hours, and working conditions of American workers and thus ultimately benefit not only those workers, but society as a whole. There is no evidence to indicate that these rights and powers were granted unions because it was believed that labor union leaders possessed such unique disinterest or expertise in political or foreign policy matters that the national interest would be advanced by union ordered strikes and stoppages over political and foreign policy matters.

As time progressed, it was perceived that unions may have been granted too many rights and too much power and that too often the public and innocent third parties were being hurt by strikes and stoppages whose objects were becoming increasingly remote from traditional primary objects. Ultimately, in 1947 the LMRA's secondary boycott provisions were enacted

[16] These include rights to represent and in some cases to be paid dues by individuals who do not desire such representation or wish to pay such dues, rights to bargain with private employers who do not wish to bargain and certain immunities (from antitrust laws) that foster national or regional multi-employer collective bargaining. *See generally The False Doctrine of Mutuality*, Appendix D to the Minority Views in S. Rep. No. 187 in S. 1555, 86th Congress, 1st Session, *reprinted in* LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 507 (1959).

to achieve the dual objectives of prohibiting unions from using their extensive federally granted powers to injure the public by means of strikes for remote objects, but still of permitting them to use those powers in a manner consistent with traditional concepts of workers improving their own wages, hours, and working conditions by striking their own employers. *NLRB* v. *Denver Building & Construction Trades Council, supra,* 341 U.S. at 692. *See also* legislative history and authority at S.M. at 12a-14a.

Given that a secondary work stoppage for a political objective must by its nature be more remote from a union's legitimate interest in its members terms and conditions of employment than a secondary work stoppage in support of an objective of improving one or more of those employment terms and conditions, the Act's purposes require that the political secondary stoppage be prohibited at least as strictly as the economic secondary stoppage. Thus, the court below correctly concluded that "without even the justification of a labor-oriented motive, [the union's] forbidden secondary activity is *a fortiori* precluded." 21a, 640 F.2d at 1378. *Cf. NLRB* v. *Washington-Oregon Shingle Weavers Dist. Council,* 211 F.2d 149, 152 (9th Cir. 1954). Moreover, of the six circuit courts that have considered the matter, including the court of appeals below, only the Fourth Circuit, in a split decision, has held that a "labor dispute" is essential for LMRA jurisdiction. *Compare NLRB* v. *ILA (Ocean Shipping),* 332 F.2d 992 (4th Cir. 1964) *with Soft Drink Workers, Teamsters Local 812* v. *NLRB,* __ F.2d __, 105 LRRM 2658 (D.C. Cir. 1980), *National Maritime Union* v. *NLRB,* 346 F.2d 411 (D.C. Cir.), *cert. denied,* 382 U.S. 840 (1965), *NLRB* v. *Twin City Carpenters Dist. Council* 422 F.2d 309 (8th Cir. 1970), *NLRB* v. *Local 11, Carpenters,* 242 F.2d 932 (6th Cir. 1957) and *NLRB* v. *Washington-Oregon Shingle Weavers Dist. Council, supra.*[17]

[17] In S.M. at 13a n.15, the NLRB has similarly listed the authority for the proposition that no primary dispute is necessary for a Section 8(b)(4)

The determination in *Ocean Shipping, supra*, 332 F.2d at 995-996, that a "labor dispute" is essential to LMRA jurisdiction rested primarily upon plucking an illustrative sentence from *Marine Cooks & Stewards* v. *Panama Steamship Co.*, 362 U.S. 365, 372 (1960) out of context. *See* the subsequent discussion by the Court of Appeals for the District of Columbia in *National Maritime Union* v. *NLRB, supra*, 346 F.2d at 415-416.

In addition, it appears that the law review commentary on the subject of ILA political boycott activity has unanimously concluded that such activity should be found to be a secondary boycott violating the Act. Note, 78 HARV. L. REV. 463 (1964); Note, 51 VA. L. REV. 157 (1965); *Caddell, Longshoremen's Embargo of Soviet Goods: A Secondary Boycott or a Political Protest*, 32 MERCER L. REV. 857 (1981); *Maatman, Protest Boycotts and Federal Labor Laws: The Russian Trade Boycott Litigation*, 3 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS 211 (1981).[18]

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violation. While the ILA is correct in pointing out at p. 40 of its brief that some of these courts have raised a question as to whether the Act should apply to an ILA political boycott, none have held it should not, and none have had the benefit of this Court's recent teaching in *United Assoc. of Journeymen & Apprentices* v. *Local 334 Plumbers* that the plain language of LMRA coverage controls unless there is compelling legislative history or policy to the contrary, particularly where such coverage would contribute to the achievement of labor stability.

[18] Allied's basic position that the existence of a "labor dispute" is not a jurisdictional pre-requisite for the application of LMRA secondary boycott sanctions renders irrelevant to the instant case the answer to the question presented in *Jacksonville Bulk Terminals* v. *ILA*, No. 80-1045, as to whether the ILA's Russian boycott is a "labor dispute". However, if this Court disagrees with Allied and concludes that a labor dispute is a jurisdictional pre-requisite for the application of the secondary boycott provisions, then the outcome of *Jacksonville Bulk Terminals* may become highly relevant. In that event, Allied would agree with the conclusion of the Solicitor General in the *Jacksonville Bulk Terminal* case that while the ILA's conduct is a "labor dispute", it is subject to being enjoined. Allied submits that a finding that the ILA's conduct is a violation of Section 8(b)(4) is far more important to the national interest in preventing future boycotts of this kind than a finding that the ILA's conduct is not a "labor dispute". The LMRA statutory scheme

In attempting to justify its Russian boycott, the ILA stresses the highly conceptual argument that its object was solely protest and that a solely protest object does not amount to a "cease doing business" object within the meaning of Section 8(b)(4). ILA Main Brief at pp. 24-28. Allied submits that this proferred justification ignores the fundamental principle of tort law that a tortfeasor is not exonerated from responsibility for the foreseeable consequences of his actions by resorting to the argument that his actual intent was something else. A secondary boycott is in the nature of a tort. *Consolidated Express, Inc.* v. *New York Shipping Assoc.*, 602 F.2d 494, 509 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980). The responsibility of tortfeasors for the foreseeable consequences of their acts is demonstrated by the following illustration from RESTATEMENT (SECOND) OF TORTS, § 8A (1965):

> A throws a bomb into B's office for the purpose of killing B. A knows that C, B's stenographer, is in the office. A has no desire to injure C, but knows that his act is substantially certain to do so. A is subject to liability to C for an intentional tort.[19]

Consistent with these principles, this Court has squarely affirmed that an object of a union's boycott for purposes of Section 8(b)(4) can be determined from the foreseeable conse-

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allows anyone injured by a secondary boycott to bring an action to terminate that boycott. Thus, so long as there is LMRA coverage, a powerful union cannot frustrate the national interest by using its power to obtain a provision in its collective bargaining agreements with employers permitting it to order such boycotts. Indeed, such a provision in a collective bargaining agreement violates § 8(e) of the NLRA, 29 U.S.C. § 158(e). *See also* p. 31 n. 29 *infra*, discussing the probable reluctance of contracting employers to pursue private remedies. If there were no LMRA coverage, a union like the ILA might frustrate the national interest by negotiating such a provision.

[19] In this illustration injury to C is not even necessarily consistent with the ultimate asserted object of injury to B. Where, as in the instant case, a massive trade disruption with Russia is consistent with an asserted ultimate object of protesting a Russian action, liability for foreseeable consequences must follow.

quences of its conduct. *Safeco, supra*, 100 S.Ct. at 2377; *NLRB* v. *Local 825, IUOE (Burns & Roe)*, 400 U.S. 297, 305 (1971).[20] Indeed, as discussed by the court below, a "protest" aspect, element or assertion is almost inevitably involved in any hot cargo type of secondary boycott that routinely arises and thus resort to the foreseeable consequences test is also routinely involved. 15a-16a, 640 F.2d at 1375-1376.

Finally, the ILA appears to argue that it was not foreseeable that its conduct would result in a substantial cessation of doing business involving Allied or any other secondary employers because its interference with their business was limited to its refusal to handle only their Russian cargoes and did not extend to refusals to handle other cargo or to other retaliation against them. ILA Brief at pp. 27-28. However, the law is settled that so long as it is foreseeable that the business disruption caused by a given degree of secondary union conduct will rise at least to the level of being "substantial", the fact that the union could have been more disruptive is no defense. *Burns & Roe, supra*, 400 U.S. at 304-305; *Local 5, United Assoc. of Journeymen* v. *NLRB*, 321 F.2d 366, 370 (D.C. Cir.), *cert. denied*, 375 U.S. 921 (1963). Unions such as the ILA have immense power, and the exercise of even a portion of that power can in fact have devastating results on innocent third parties, the public and trade and foreign policy.

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[20] The ILA's assertion at p. 25 of its brief that the application of a foreseeable consequences test to this case would make every strike or every refusal to handle illegal is nonsensical. As pointed out by the court below, the union's conduct here cannot be "characterized as 'primary activity' ", thus distinguishing it from the many other common situations discussed at n.6 by that court. 16a-17a, 640 F.2d at 1376. The ILA's Russian boycott advances or protects no primary interest of the longshoremen it represents unless the law is to move to the radical degree that the political acts or views of an employer's suppliers or customers are to be construed as "terms and conditions of employment" within the meaning of § 8(d) of the Act, 29 U.S.C. § 158(d). In sum, where a union's conduct is primary, that union has nothing to fear from § 8(b)(4). Where it is secondary, § 8(b)(4) will normally apply.

The determination in *Ocean Shipping, supra,* 332 F.2d at 996-998, that the conduct involved there was not secondary was erroneous primarily because it did not adequately take into account the reality, as subsequently more clearly articulated by this Court in *Burns & Roe* and *Safeco,* that the "original congressional concern" demands that "flagrant secondary conduct with these most serious disruptive effects" be found to be prohibited by Section 8(b)(4). *Burns & Roe,* 400 U.S. at 305.

C. *The Foreign Situs of the Dispute Motivating the Union's American Disruption Should Not Affect the Result.*

For a long time there was no exception to the doctrine that the meaning of the term "in commerce" in the National Labor Relations Act and the Labor Management Relations Act was co-extensive with the constitutional reach of the Commerce Clause. As stated in *Guss* v. *Utah Labor Board,* 353 U.S. 1, 3 (1956):

> Since it was first enacted in 1935, the National Labor Relations Act has empowered the National Labor Relations Board "to prevent any person from engaging in any unfair labor practice . . . affecting commerce." By this language and by the definition of "affecting commerce" elsewhere in the Act, *Congress meant to reach the full extent of its power under the Commerce Clause* (citation omitted) (emphasis added).

See also NLRB v. *Fainblatt,* 306 U.S. 601 (1939); *Polish National Alliance* v. *NLRB,* 322 U.S. 643, 647-648 (1949); legislative history cited at S.M. at 9a-10a.

To the knowledge of Allied, the first exception to this doctrine was *Benz* v. *Compania Naviera Hidalgo,* 353 U.S. 138 (1957). In *Benz* this Court held that the protections of the Act should not be construed to protect picketing by American

unions supporting a strike by foreign seamen against their foreign shipowner-employer at the situs of that strike. This Court noted that a "storm of diplomatic protest" arose as a result of an earlier effort by some in Congress to dictate pay procedures for foreign seamen on foreign ships and concluded that "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed." 353 U.S. at 146-147. Similar concerns over possible interference with international relations motivated this Court to deny coverage of the Act in *McCulloch* v. *Sociedad National deMarineros*, 372 U.S. 10 (1963) and *Incres Steam Ship Co.* v. *International Maritime Workers*, 372 U.S. 24 (1963) — cases raising questions, respectively, of whether the NLRB had jurisdiction to conduct a representation election among foreign seamen on a foreign ship and whether an American union's picketing to represent such seamen was protected under the Act. However, this Court in *Incres*, for no articulated reason, added the observation that "The Board's jurisdiction to prevent unfair labor practices ... is based upon circumstances 'affecting commerce', and we have concluded that maritime operations of foreign-flag ships employing alien seamen are not 'in commerce' within the meaning of [the Act]." 372 U.S. at 27.

Eleven years later in *Windward Shipping* v. *American Radio Association*, 415 U.S. 104, 112-113 (1974), this Court affirmed that the references to the statutory terms "in commerce" and "affecting commerce" in *Incres* were nothing more than statutory pegs upon which comity considerations, and only comity considerations, were hung when it stated that "Those cases which deny jurisdiction to the NLRB recognize that Congress when it used the words 'in commerce' in the LMRA simply did not intend the Act to erase longstanding principles of comity and accommodation in international maritime trade." This Court in *Windward* then held that the Act did not protect an American union's picketing of a foreign-

flag ship to protest the failure to pay American wage rates to the foreign seamen employed on that ship. Finally, in *American Radio Association* v. *Mobile Steamship Association*, 419 U.S. 215, 222 (1974), this Court held that the identical conduct involved in *Windward* was also not within the jurisdiction of the Act for secondary boycott purposes, stating that "We do not believe, however, that the line of cases commencing with *Benz* and culminating in *Windward* permit such a bifurcated view of the effects of a single group of pickets at a single site."[21]

Each of those foreign-flag ship cases in which LMRA jurisdiction was denied essentially involved an effort instigated or supported by an American union occurring in proximity to foreigners on a foreign ship to impose directly American conditions or regulation upon that ship — conduct that would have been at least arguably protected under Section 7 of the NLRA had the NLRA applied.[22]

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[21] The aforecited cases and *ILA, Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195 (1970) are commonly known as the foreign-flag ship cases. In *Ariadne* it was held that the Act could apply to a dispute over the wages to be paid Americans for longshore work on a foreign ship in an American port since application of United States law "would have threatened no interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law." 397 U.S. at 200.

[22] All of the cases except *McCulloch* involved picketing at the situs of the primary dispute — the ship whose terms and conditions of employment incurred the displeasure of the picketing union. Picketing at a primary situs, at least so long as it is for an object related to terms and conditions of employment (see n. 24 *infra*), is normally primary activity protected by Section 7 of the Act unless there is evidence to indicate that a broader impermissible secondary object also exists, *see e.g.*, *Windward*, *supra*, 415 U.S. at 109; *Local 761, IUE (General Electric)*, *supra*; *IBEW, Local 211 (Atlantic County Improvement Authority)*, 248 NLRB 168, 172-173 (1980), or unless it is picketing for a recognitional object that exceeds the limits of § 8(b)(7) of the Act. *McCulloch* involved an effort to obtain an NLRB election which is clearly protected activity. Accordingly, Allied submits that there is no basis for the assertion by the ILA in its brief at p. 14 n.12 that *Mobile* clearly involved secondary activity. The answer to the question of whether it was primary or secondary would depend upon the outcome of an analysis of all the facts akin to the analysis employed in *Atlantic County Improvement Authority*, *supra*.

In these narrow and unique circumstances, it can make sense to hold that a comity rationale precludes NLRA jurisdiction. Foreigners would foreseeably be seriously offended if such direct and proximate interference in their traditional right to run their ships as they saw fit was sanctioned and protected by the full majesty of American national legislation. However, where, as in the instant case, the union's conduct in America involved protesting the conduct of a foreign party to an already existing primary dispute overseas, the Court was careful to specify that the Act could still apply to that American union conduct. *See Mobile Steamship Assoc., supra,* 419 U.S. at 225 n.10, where the validity of *Madden* v. *Grain Elevator Workers Local 418,* 334 F.2d 1014 (7th Cir. 1964), *cert. denied,* 379 U.S. 967 (1965) and *Grain Elevator Workers Local 418* v. *NLRB,* 376 F.2d 774 (D.C. Cir. 1967), *cert. denied,* 389 U.S. 932 (1967) were specifically affirmed. In such cases there is no interference by the union "in the management or affairs of foreign companies, workers, or labor organizations," 12a, 640 F.2d at 1374, and no "attempt to regulate the internal management of the Canadian ships." S.M. at 12a. Applying federal law to protests in America by Amercians over the conduct of foreigners in a pre-existing dispute simply does not present the kind of objectionable direct intrusion into traditional international law and practice concepts of sovereignty as is presented by applying federal law to protect conduct largely instigated by Amercians at the site of a foreign ship to impose by legal or economic coercion American laws, procedures or standards upon the management of that ship.

Indeed, the relevance of the foreign-flag ship cases to the issue posed by the instant case is in any event remote. The portion of the Russian boycott at issue here is the product (cargo) boycott. It is not the boycott of Russian ships. If the President of a Teamster Union local in Omaha, Nebraska ordered his truckdrivers and warehousemen not to handle Russian prod-

uct because of the Russian invasion of Afghanistan, the case would be conceptually identical to the instant case. However, the relevance to this Nebraska situated problem of rules and rationales rooted in the traditional law of the high seas, such as *The Charming Betsy*, 2 Cranch 64 (1804), *Brown* v. *Duchesne*, 19 How. 183 (1857), *Wildenus's Case*, 120 U.S. 1 (1887)[23] and the other high seas cases upon which this Court predicated its foreign-flag ship decisions, would be something less than obvious. This is a hot cargo product boycott case, not a case involving a dispute over a ship or some aspect of the operation of a ship.

The reason the foreign-flag ship cases were an exception to the usual rule that a United States statute is presumed to govern all conduct within its terms within the territory of the United States was that foreign ships are foreign territory and applying the LMRA to the conduct in question in U.S. ports could have therefore controlled conduct abroad. RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 38, Reporter's notes at p. 109 (1965). Surely, no argument can be made that LMRA jurisdiction over the ILA's Russian boycott will control the outcome of the war in Afghanistan. Therefore, law involving the narrow and unique problem of rights of foreigners versus rights of Americans with respect to disputes on board foreign-flag ships in American ports does not have a direct bearing on the problem at hand.

However, in terms of comity considerations, the distinction between a direct primary interference and interference in support of a primary dispute elsewhere is not the only significant difference between the ILA's Russian boycott and the foreign-flag ship cases. At least as important is the point that, under settled legal principles, no possible interpretation of the facts could result in a finding that the Russian boycott was pro-

[23] *The Charming Betsy* and *Wildenus's Case* were cited at p. 21 of *McCulloch* and *Brown* v. *Duchesne* was cited at p. 146 n.7 of *Benz*.

tected by Section 7 of the Act.[24] In contrast, as pointed out at p. 21 n.22 *supra*, the picketing at the primary situs context involved in the foreign-flag ship cases normally raises the possibility that a factual analysis by the NLRB could result in a determination that the picketing is protected. Since the comity concern that foreigners might be offended and tempted to retaliate arises only out of the possibility that conduct offensive to foreigners might be held by the NLRB to be protected, then when, as in the instant case, there is no possibility that the conduct in question might be held protected, comity considerations vanish and there is no reason for denying NLRB jurisdiction on the basis of the precedent of the foreign-flag ship cases.[25]

A basic disagreement between Allied and the ILA is with respect to the ILA's statement at p. 19 of its brief that "the foreign entity's pique or pleasure at the result is not the crux

[24] For the reasons set forth on pp. 18-19 *supra*, the court of appeals below was right in concluding that the ILA's conduct under no reading of the facts can be characterized as primary, and the Fourth Circuit was therefore wrong in reaching a contrary conclusion in *Ocean Shipping*, *supra*. However, even if it is thought that there might be some reading of the facts that could result in the conclusion that Mr. Gleason's January 9, 1980 order to his longshoremen not to handle Russian cargo was primary and not secondary, the fact that it was for a political rather than an economic objective means that it, and conduct pursuant to it, was primary activity that was unprotected by Section 7 of the Act. *Eastex, Inc.* v. *NLRB*, 437 U.S. 556 (1978); *Auto Workers Local 174* v. *NLRB*, 645 F.2d 1151 (D.C. Cir. 1981). Thus, for either or both of these reasons, there is no possibility the ILA could prevail on a contention that its Russian boycott was protected activity.

[25] It is clear that no foreigner engaged in trade with the United States would be in the slightest offended by the application of LMRA secondary boycott sanctions to terminate disruptions to that trade. *See Plumbers Union* v. *Door County*, 359 U.S. 354, 359 (1959), where in refuting an argument that essential state functions might be impaired if LMRA secondary boycott proscriptions were applied to a disruption at a county building project this Court said "Board jurisdiction to grant relief, far from interfering with county functions, serves to safeguard the interest of such political subdivisions."

of the comity question." Allied would submit that such pique or pleasure is the crux of the comity question. Unless there is some possibility that some foreigner whose operations are directly affected may be piqued at a result, there is no comity reason not to apply a domestic law that might bring about that result, at least so long as the conduct in question occurs within United States territory.

In sum, Allied is suggesting a two step test for dealing with comity and jurisdiction of LMRA cases. The first step is to ascertain whether, under the facts as alleged, it is fairly arguable that the union's conduct is protected by Section 7 of the Act and whether, if it is so protected, the result will be offensive to foreigners. If the answer to either of these questions is in the negative, then no possible comity bar to federal jurisdiction exists, and no further inquiry is necessary. If, however, the answer to both of these questions is in the affirmative, then the second step is to decide whether the facts as alleged place the case in the category of those where the degree of foreseeable offense to foreigners arising from federal jurisdiction exceeds the value of federal jurisdiction to Americans, or *vice versa*.[25] While the application of this kind of test might possibly have the result of disadvantaging unions more often than management, (*See* ILA Brief at pp. 19, 23 and AFL-CIO *Amicus Curiae*

[25] The precedents of this Court establish some guidelines for this weighing process. Thus, *Ariadne* suggests that where the union's conduct is designed to improve directly the wages of American workers, federal jurisdiction is in order even if this result annoys foreigners. As discussed at p. 22 *supra*, *Mobile Steamship's* endorsement of the result in the *Grain Elevator Worker* cases suggests that federal jurisdiction is in order when the union's conduct in America is a protest over the conduct of a foreigner in a pre-existing dispute in a foreign land even though this result might also annoy that foreigner. On the other hand, *Mobile Steamship* and the other foreign-flag ship cases suggest that federal jurisdiction is not in order when the union's American conduct is a direct effort to impose American conditions or representation on foreigners that occurs in proximity to those foreigners and their foreign ship even though American commerce is to some extent affected.

Brief at p. 2),[37] the possibility of that result is no reason for discarding the suggested test. As discussed in more detail at p. 35 *infra*, management and unions have very different kinds of responsibilities, powers, and roles to play in our society, and it is therefore natural and right that some legal doctrines and judicial interpretations will burden unions more than management while others will burden management more than unions.

Allied submits that the determination of the Court of Appeals for the Fifth Circuit in *Baldovin* v. *ILA*, *supra*, that the foreign-flag ship cases precluded LMRA jurisdiction over the ILA's Russian boycott was wrong. The central misconception of *Baldovin* was the court's statement that "the secondary boycott prohibition was designed to narrow the labor controversy into a confrontation between the primary opponents." 626 F.2d at 450. While this may be the effect of the secondary boycott prohibition in many situations, the central purpose, as set forth pp. 13-15 *supra*, is to prevent strikes for remote objects while preserving union rights to strike for primary objects. Because of its misconceived focus on a confrontation between primary opponents rather than a proper focus upon a prevention of strikes for remote objects, the Fifth Circuit concluded that the ILA's Russian boycott conduct was not "in commerce" because of the remoteness of the Russian invasion of Afghanistan to commerce. 626 F.2d at 453-454. The Fifth Circuit felt it was "anomalous" that an injunction would issue when the primary dispute did not involve labor relations, but not issue in some circumstances (*e.g.*, *Windward*) when labor relations were involved. *Id.* Allied,

[37] The statement of the AFL-CIO at p. 2 of its *amicus curiae* brief that affirming the First Circuit's decision below without overruling all of the foreign-flag ship cases finding no LMRA jurisdiction means that "the union always loses" is clearly not true. In the *Mobile Steamship* case management specifically lost the right to access to the relatively swift and predictable processes of the NLRB to terminate any secondary conduct of a union that may be involved in a case of that kind.

however, submits that no such anomaly exists since the nature of the primary dispute, if any, is irrelevant. The more remote a union's secondary object, the more justification exists for an injunction. Allied further submits that the Fifth Circuit's misconceived focus on primary opponents resulted in its failure to consider anywhere in its opinion the central issue of whether the comity concerns upon which the foreign-flag ship cases were predicated had any real relationship to the Russian boycott fact situation. As demonstrated at pp. 21-25 *supra*, they have no such relationship.

Given that it has long been established that the production of wheat upon but a few acres can affect commerce sufficiently to justify federal jurisdiction, *Wickard* v. *Filburn*, 317 U.S. 111 (1942), it surely strains the plain meaning of words to conclude that the statutory terms "in commerce" or "affecting commerce" were not meant to cover the billions of dollars of imports and exports involved in American-Russian trade, including a rather substantial portion of America's wheat crop.

The LMRA is a "bill of rights both for American workingmen and their employers". *Benz*, *supra*, 353 U.S. at 144, quoting from H.R. Rep. No. 245, 80th Cong. 1st Sess. 4 (1947). American employers like Allied, American workingmen like longshoremen who disagree with the Russian boycott and the American workers in other industries throughout the nation who lost their jobs as a result of it, J.A. 33a-34a, all have LMRA rights not to be injured by union ordered secondary boycotts. It is these rights of these Americans in American commerce that have been violated.

Finally, Allied submits that the ILA's Russian boycott should be covered by the LMRA although the conduct involved in *Windward* and *Mobile* was not covered because the Executive Branch of the government through the Solicitor General is in the instant case urging LMRA coverage. It is respectfully submitted that in light of the Executive Branch's constitutional responsibility for the conduct of foreign affairs, it is better

equipped than the judiciary to determine the presence of comity considerations to restrict the application of federal statutes. Therefore, at least heavy weight should be accorded the position of the Executive Branch on such a question. *See Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945).

D. *There Is No Substantial Constitutional Question*

Allied submits that the instant case raises no substantial constitutional issue. Persons engaged in political protest or expression involving orders and actions rather than merely "pure speech" are not protected against prior restraint or appropriate civil or criminal liability for damage to innocent bystanders if their manner of expression is "basically incompatible" with the normal activity of others. *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972). Allied is not aware of any decision of this Court according First Amendment protection to acts with a protest motivation that caused the massive and devastating direct and foreseeable damage to innocent third parties, the public, and American trade and foreign policy interests as were caused by ILA President Gleason's order to his longshoremen not to handle Russian cargo. Thus, the ILA's assertion of First Amendment protection must fail unless it can articulate some unusually compelling real First Amendment interest that was served by the conduct of its President, Mr. Gleason.

Not only has the ILA failed to articulate any such compelling interest, no First Amendment interest of any magnitude was served by Mr. Gleason's conduct. To the contrary, his ordering all longshoremen represented by the ILA to refuse to handle Russian cargo merely because, at most, some of them may have expressed a desire not to do so is patently offensive to the First Amendment interests, including conscience, of those longshoremen who may have felt that such a disruption of

trade with Russia was harmful to United States foreign policy or the cause of world peace. *Cf. TWA* v. *Hardison*, 432 U.S. 63, 85 (1977). It must always be kept in mind that the defendants in the instant case and in the related NLRB case, S.M. at 1a, are not the individual workers who either willingly or grudgingly obeyed the order not to handle Russian cargoes. The defendants are the union and its responsible officials who issued the order. Accordingly, the First Amendment interests at issue are not the conscience interests of the individual workers in not handling product they find morally repulsive, but rather the interests of unions and union officers in ordering workers not to handle product that the union officers assert is morally repulsive. *See* authority cited at 23a n.11, 640 F.2d at 1379 n.11 and by the Fifth Circuit in *Jacksonville Bulk Terminals* v. *ILA*, *supra*, 626 F.2d at 462-463.

Initially, the ILA's attempted justification for Mr. Gleason's conduct fails to recognize that the "conscience" interests asserted, whether they be those of the union leaders or of the membership, plainly do not rise to the level of the deep religious-like conviction that has been accorded maximum First Amendment protection. The ILA leadership's periodic refusal to handle orders does not go to all wars. As stated in *Gillette* v. *United States*, 401 U.S. 437, 455 (1971) "[O]ver the realm of possible situations, opposition to a particular war may more likely be political and nonconscientious, than otherwise." Indeed, even where a public employee's objections to performing a portion of her job were clearly conscientious, the First Amendment did not give her the right to refuse to perform. *Palmer* v. *Board of Education of City of Chicago*, 603 F.2d 1271 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980). *See also Garman* v. *United States Postal Service*, 509 F. Supp. 507, 511 (N.D. Ind. 1981) ("The First Amendment is not a license to employees to perform only those duties which meet their private approval.")

Rather than attempting to articulate any specific compelling First Amendment interest that can only be served by granting its officers the right, at their sole discretion, to order all longshoremen not to handle Russian cargo, the ILA seeks to justify its conduct upon the general ground that since the officers of religious hospitals, private schools and corporations presumably can order their enterprises not to deal with whomever they choose on grounds of "conscience", as interpreted and applied by them, union leaders should have a similar right.[28] ILA Brief at pp. 35-37.

First and perhaps foremost, as described at pp. 14-15 *supra*, labor unions are the holders and beneficiaries of extensive federally granted monopoly-like rights and powers — which are particularly relevant in the context of this case. If the officers of a given company decide on grounds of conscience that their Company will not buy Allied's Russian wood, Allied still has many other possible customers, including competitors of that company. However, when the leaders of the ILA decide that longshoremen will not handle Russian wood, the union's federally granted monopoly-like powers cause the virtual cessation of Allied's ability to service its customers and the massive disruption of other Russian trade. If in response to complaints from some shareholders about Russian foreign policy, the officers of an electric public utility were to assert "conscience" as the reason for cutting off electricity to any manufacturer processing Russian raw materials while it was processing those raw materials, surely the utility could not raise a constitutional defense to an action against it by an adversely affected manufacturer.

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[28] This asserted "right" is not in most cases, however, a constitutional right. Thus, the "right" of a president of a corporation operating a hotel to order hotel employees to refuse to deal does not extend to ordering them to refuse to deal with blacks or other minorities regardless of the alleged state of the "conscience" of that corporation president or the hotel employees. Title II of the Civil Rights Act of 1964, Pub. L. 88-352, § 201 *et seq.*, 78 Stat. 243 (1964), 42 U.S.C. § 2000 *et seq.*. Legislation can and has restricted rights to refuse to deal in the business context and rights to order strikes in the labor union context, and such legislation does not violate the First Amendment unless the First Amendment interest at stake is unusually compelling in relation to the legitimate purpose achieved by the legislation.

Secondly, while part of the purpose of the management of a hospital, private school, or corporation is to decide with whom the enterprise does or does not deal, under the American system of labor law and labor relations, it is the employer, not the leaders of the union representing its employees, who decides with whom it deals.

Finally, unlike the traditional business context, in the union ordered refusal to handle context there is often an asymmetry between the damage done to owners of the product in question and the price paid by union leaders who order the refusal and the workers who obey that order. So long as the ports are reasonably busy, the longshoremen who obey the order not to handle Russian cargo lose little or no pay because there is plenty of other work, and the refusal to handle order thus creates little or no internal political problem for the union leadership. In contrast, Allied is nearly destroyed by the order.[29]

[29] A similar asymmetry exists that limits the value of § 301 of LMRA to deal with situations like the ILA's Russian boycott and highlights the need for application of LMRA secondary boycott provisions to protect rights of damaged parties and the public. So long as the ports are busy, the shipping associations who have collective bargaining agreements with the ILA lose little or nothing when the ILA boycotts Russian cargo. Accordingly, they have little reason to incur the displeasure of the ILA by bringing a § 301 action against the boycott in their ports. Accordingly, only five § 301 actions were brought against the ILA in response to its Russian boycott (*See* the ILA's Main Brief in *Jacksonville Bulk Terminals* v. *ILA*, No. 80-1045 at p. 3 n.3) despite the boycott's impact on Russian shipping in many other ports from Maine to Texas. The Boston Shipping Association specifically refused Allied's request to bring such an action in Boston. J.A. at 29a-30a. This illustrates a particularly insidious aspect of the ILA's Russian boycott. It is in substance a partial strike. See *NLRB* v. *Montgomery Ward & Co.*, 157 F.2d 486, 496 (8th Cir. 1946). In a normal strike, the workers striking, the union involved, and the employer being struck are all incurring substantial losses, and so all have an incentive to settle the strike and resume normal operations. In a Russian boycott type partial strike, however, these immediate parties to the strike are losing little or nothing, and thus there is little, if any, incentive for them ever to settle. Thus, like other illegal secondary boycotts, the ILA's conduct here creates pressures "significantly different in kind and intensity from the inconveniences a neutral employer experiences when someone with whom he is doing business is struck." *NMU* v. *NLRB*, *supra*, 346 F.2d at 418 n.13.

However, in the business context the losses are symmetrical. If a major customer of Allied refuses to buy its Russian wood on "conscience" grounds, both that buyer and Allied incur a major loss, while if the refusal is by a minor customer, the loss to both is minor.

In contrast to the unique damages and problems created by the union ordered political product boycott, no specific First Amendment interest can be cited to justify it — particularly given the plethora of other alternatives available to union leadership confronted with a situation where some of its members raise a concern about handling product for political reasons.[30] For example, a union can: (a) attempt to persuade employers and union members to agree to work assigning arrangements that will accommodate the concern of those workers who do not wish to handle the product in question while having the work done by those who do not share this concern; (b) attempt to persuade employers not to discipline those workers who do not wish to handle the product and vigorously challenge in grievance-arbitration any significant discipline of them by the employer; (c) attempt, within the limits defined in *NLRB* v. *Servette*, 377 U.S. 46, 49-54 (1964), to persuade employers to exercise their managerial discretion not to handle the product in question; (d) engage in consumer picketing of the product in question within the limits set forth in *Safeco, supra;* (e) engage in primary picketing of any business situs, fixed or ambulatory, of the primary within the rules for the scope and nature of such picketing set forth in law, *see e.g., Sailors Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547 (1950); (f) engage in a brief or similar kind of protest motivated work stoppage or refusal to handle that perhaps does not

[30] The consideration of alternative means of communication and action is a relevant consideration in adjudicating the validity of a First Amendment defense except where the government action is targeted at ideas or information it wishes to suppress or shuts down a public forum traditionally associated with the public exchange of views. TRIBE, AMERICAN CONSTITUTIONAL LAW, §§ 12-20 and 12-21 at pp. 683-691 (1978) and authority cited therein. Since Mr. Gleason's boycott order does not come within the scope of either of these two exceptions, the ILA is wrong when it asserts at p. 38 n. 54 of its brief that considering alternatives is irrelevant.

amount to a violation of Section 8(b)(4) because it does not foreseeably result in a substantial disruption of business within the meaning of *Safeco* and *Burns & Roe*[31]; and (g) engage in any or all of the infinite multitude of constitutionally protected publicity or political activity to draw the public's attention to the political concern and to attempt to secure passage of legislation or other governmental action to help deal with it.

The rarity of this political boycott kind of conduct by American unions (with the notable exception of the ILA)[32] illustrates the success that in fact responsible American union leaders have had over the years in channeling political concerns of their members into the generally constructive modes suggested above rather than letting them spill over into the destructive mode of union leadership ordered refusals to handle. Thus, the resources of unions have been conserved for their statutory purpose of protecting and improving the terms and conditions of employment of the workers represented rather than squandered in quixotic and injurious political boycotts. The fact that over the years responsible union leaders have been able to advise their members that union sponsored secondary refusals to handle for political reasons were viewed by the NLRB as unlawful and could lead to damage awards depleting the union's treasury has foreseeably played a major

[31] It is possible that the ILA's twenty-four hour refusal to load or unload British ships in protest over the death of Bobby Sands might fit into this category. *See Maatman, Protest Boycotts & Federal Labor Laws: The Russian Trade Boycott, supra*, 3 N.W. INT'L L. & B., at 221-222.

[32] *Protest Boycotts & Federal Labor Laws*, at 218-227. The ILA's unique and apparently escalating history of resort to the union ordered political boycott tactic may illustrate that once a union leadership begins to set the precedent of capitulating to demands from a "single issue" faction in the union to use the union's power to order a boycott of products disfavored by that faction, it becomes increasingly difficult for that leadership to resist similar demands from other factions with respect to their particular concerns. On the other hand, it may simply reflect a uniquely arrogant or whimsical trait of the ILA leadership.

role in helping deter resort to this tactic. It is respectfully submitted that any decision by this Court that sanctions the ILA's Russian boycott, or in any way raises a question as to LMRA's coverage of it, will substantially compromise the ability of responsible union leaders to continue to be able to deal successfully and constructively with pressures from membership factions demanding union sponsored secondary political work stoppages.

In considering asserted First Amendment issues in the context of legislation regulating labor union conduct, this Court has consistently dealt with the realities of that context. It has sought to identify the real business or other legitimate interests protected by the legislation and to balance them against any real damage to articulated legitimate First Amendment interests. Thus, this Court has recognized the reality that picketing by an organized group is more than merely the abstraction of free speech. *Teamsters Local 695* v. *Vogt*, 354 U.S. 284, 289 (1957). It has recognized that the balance must be struck in favor of the First Amendment protected publicity interest when consumer picketing damage only discourages consumption, *NLRB* v. *Fruit Packers (Tree Fruits)* 377 U.S. 58 (1964), but struck in favor of the application of the Act's prohibitions when the reality of the foreseeable damage to a neutral rises to the level of ruin or substantial loss, *Safeco, supra*. The realities of the competing interests involved in deciding whether the First Amendment protects Mr. Gleason's Russian boycott order simply bear no relation to the realitites of the competing interests involved in deciding whether the First Amendment protects a religious hospital's rights to prohibit abortions on its premises or any of the other widely dissimilar fact situations involved in most of the cases cited by the ILA at pp. 33-43 of its brief.[33]

[33] Contrary to the ILA's arguments at pp. 30-31, 41 of its brief, precedents on the issue of the application of antitrust law to politically motivated

Looking to reality rather than abstraction is not, of course, a euphemism for unions always losing. Unions have been the beneficiaries of this Court's determination that real and legitimate First Amendment interests of individual employees, including religious and moral "conscience" type concerns such as views on desirability of abortion, must in the balancing process yield to the stronger economic and practical needs to compel those employees to support financially their collective bargaining representative. *Abood* v. *Detroit Board of Education* 431 U.S. 209, 222 (1977). Unions have also benefitted from this Court's recognition that the unique and special economic dependence of employees on their employer is a reality that permits governmental intrusion into the content and manner of employer speech during a union organizing campaign to a far greater extent than the First Amendment would ordinarily permit governmental intrusion into speech. *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620 (1969).

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restraints are inconclusive and inapposite. This Court has never held that either the First Amendment *per se* precludes such application or that such application *per se* does not come within the intent of the statutes. Recent lower court cases on such issues have tended to involve split decisions, *see Missouri* v. *National Organization for Women*, 620 F.2d 1301 (8th Cir. 1980), *cert. denied*, 449 U.S. 842 (1981), or district courts disagreeing on similar facts, *Crown Central Petroleum Corp.* v. *Waldman*, 486 F. Supp. 759 (N.D. Pa. 1980), *rev'd on other grounds*, 634 F.2d 127 (3d Cir. 1980). *Compare Osborn* v. *The Pennsylvania-Delaware Service Dealers Assoc.*, 499 F. Supp. 553 (D. Del. 1980). *See also Costello Publishing Co.* v. *Rotelle*, ____F.2d ____, 1981-82 TRADE CASES ¶64, 352 (D.C. Cir. 1981). Commentators have suggested that in appropriate situations antitrust law should be applied to politically motivated acts. *See* I AREEDA & TURNER, ANTITRUST LAW § 205 (1978); SULLIVAN, HANDBOOK OF THE LAW OF ANTI-TRUST pp. 264-265 (1977); *Kestenbaum, The Antitrust Challenge to the Arab Boycott*, 54 TEXAS LAW REVIEW 1411, 1420-1422 (1976); *Bird, Sherman Act in Non-Commercial Concerted Refusals to Deal*, 1970 DUKE LAW JOURNAL 247 (1970). In any event, Allied submits that the ILA's Russian boycott involves more unwarranted disruption of commerce and trade and far less of a counterbalancing legitimate First Amendment interest than any of the fact situations in those cases where it has been held that antitrust law did not apply to a politically motivated restraint.

The decision of a panel majority in *Ocean Shipping, supra*, and of the district court below, 99a-108a,[34] are the only direct precedents for the proposition that LMRA coverage of the Russian boycott may give rise to a First Amendment problem. An analysis of the reasoning and authority of that panel majority shows its clear error in concluding that any First Amendment problem existed. The panel majority first erroneously equated the union leadership's refusal to handle products order with the very distinguishable, purely voluntary, decisions of individual consumers to engage in a consumer boycott. 332 F.2d at 999. It then further erroneously[35] implied that such union ordered product boycotts for political reasons were "not uncommon". *Id.* Finally, as authority for its conclusion that First Amendment protection existed, it cited cases involving rights of unions or civil rights organizations to provide legal services or the rights of such groups not to disclose the identity of their members and even cited one case which held that there was insufficient evidence to support a conviction for breach of the peace. 332 F.2d at 999 n 6 and cases cited therein. Obviously, none of these cases even arguably supports the proposition that a union's top leadership has a First Amendment right to wreak the havoc on commerce created by the ILA's Russian boycott. The court of appeals below effectively summarized the essence of the instant case as follows:

> We think it more rather than less objectionable that a national labor union has chosen to marshal against neutral parties the considerable powers derived by its locals and itself under the federal labor laws in aid of a random political objective far removed from what has

[34] The district court below relied essentially upon the authority and reasoning of the *Ocean Shipping* panel majority. *See Walsh* v. *ILA*, 488 F. Supp. 524, 530-531 (D. Mass. 1980), *vacated and remanded with instructions to dismiss on grounds of res judicata*, 630 F.2d 864 (1st Cir. 1980).

[35] The court below correctly pointed out that such union conduct was quite rare in the United States. 21a, 640 F.2d at 1378. Even the ILA agrees that its conduct was rare. ILA Brief p. 39.

traditionally been thought to be the realm of legitimate union activity ... The labor laws do not confer upon bargaining representatives a voice in the conduct of foreign policy. The fact that there have been few, if any, cases that have applied the secondary boycott provisions to activity motivated by a "purely political dispute" illustrates little more than the rarity with which labor unions have seen fit to engage in this sort of "political strike" conduct. The language of section 8(b)(4) and the congressional objectives that prompted its enactment point to no reason why the section should not prohibit such secondary pressure, for whatever reasons motivated. The potential danger of uncontrolled, whimsical activity is obvious. It must be remembered that a union's ability to apply crippling secondary pressure is greatly enhanced by its position under the federal labor laws; without even the justification of a labor-oriented motive, such forbidden secondary activity is *a fortiori* precluded (citation and footnotes omitted). 21a, 640 F.2d at 1378.

Finally, the ILA's argument that any First Amendment interests involved in political secondary boycott cases would receive more sympathetic hearing in state rather than in LMRA forums, ILA Brief pp. 42-43, has no merit. The injunction issue is particularly critical with respect to First Amendment considerations. The LMRA statutory scheme provides the unique safeguard of a two-step process before an injunction can be granted. Pursuant to the procedures of Section 10(b) and 10(1) of the NLRA, a private party alleging a violation of Section 8(b)(4) must first convince a regional director of the NLRB that there is reasonable cause to believe that there has been a violation. Only after the regional director is convinced that such cause exists, will he then petition the appropriate federal district court for relief, and, of course, in that forum he must bear the burden of proving to that court's

satisfaction the case for such relief.[36] In contrast, a private party can directly petition a state court for an injunction without the precondition of review by a neutral expert agency.

In general, there is much more merit to cases of this nature being litigated within the LMRA statutory scheme. The factual questions most likely to be involved in these kinds of cases are whether the union sponsored the boycott or whether individual workers spontaneously withheld services and whether substantial damage to neutrals was foreseeable as a result of the union conduct. Since the LMRA was enacted in 1947 the NLRB has been involved in perhaps thousands of cases arising in every imaginable factual context dealing with the issue of union responsibility or lack thereof for conduct of its members,[37] and this Court has specifically noted the NLRB's expertise on the issue of whether substantial damage is foreseeable. *Safeco, supra*, 100 S.Ct. at 2377 n.11. In contrast, a typical state trial court will rarely if ever deal with issues of this kind and is thus much more likely to make a major error.[38]

In sum, no substantial First Amendment issue is presented by this case, and there is therefore no reason for this Court to consider how it might interpret the statute if such an issue was presented. *See e.g., Tree Fruits, supra*, 377 U.S. at 63.

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[36] The private charging party at no time is even entitled to party status in the injunction proceeding. The prosecution of that proceeding lies exclusively with the regional director. *See Walsh* v. *ILA, supra*, 630 F.2d at 871.

[37] These cases often arise in the context of interpreting the provisions of § 2(13) of the Act, 29 U.S.C. § 152(13).

[38] In its cross-petition for certiorari in No. 80-1906 at pp. 12-13, Allied argued that LMRA and state jurisdiction over the Russian boycott could be concurrent. If this Court disagrees and believes that the boycott must be subject to either only LMRA or only state jurisdiction, then Allied submits that, for all of the reasons set forth in this brief, LMRA jurisdiction best protects the legitimate interests of all concerned — neutral employers, individual workers, unions and the public at large.

Conclusion

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Dated: December 22, 1981

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APPENDIX

1. Section 2(6) of the National Labor Relations Act as amended, 29 U.S.C. § 152(6), provides as follows:

> 2(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

2. Section 2(7) of the National Labor Relations Act as amended, 29 U.S.C. § 152(7), provides as follows:

> 2(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

3. Section 501(1) of the Labor Management Relations Act, 1947, 29 U.S.C. § 142(1), provides as follows:

> 501(1) The term "industry affecting commerce" means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

4. Section 501(3) of the Labor Management Relations Act, 1947, 29 U.S.C. § 142(3), provides as follows:

> 501(3) The terms "commerce", "labor disputes", "employer", "employee", "labor organization", "representative", "person", and "supervisor" shall have the same meaning as when used in the National Labor Relations Act as amended by this Act.

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No. 80-1663

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, LOCAL 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, and T. W. GLEASON, Individually and as he is President of International Longshoremen's Association, AFL-CIO, and H. R. HASSELGREN, Individually and as he is Secretary-Treasurer of International Longshoremen's Association, AFL-CIO and N. J. BOWERS, Individually and as he is Executive Vice President of International Longshoremen's Association, AFL-CIO and F. R. FIELD, JR., Individually and as he is General Organizer of International Longshoremen's Association, AFL-CIO and A. SCOTTO, Individually and as he is Regional Director of International Longshoremen's Association, AFL-CIO and J. T. MOOCK, Individually and as he is First Vice President of International Longshoremen's Association, AFL-CIO and R. A. MASSEY, Individually and as he is Second Vice President of International Longshoremen's Association, AFL-CIO and G. W. DIXON, Individually and as he is Third Vice President of International Longshoremen's Association, AFL-CIO and W. P. LYNCH, Individually and as he is Fourth Vice President of International Longshoremen's Association, AFL-CIO,

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ALLIED INTERNATIONAL, INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Table of Authorities

Cases:

American Radio Association v. *Mobile Steamship Association*, 419 U.S. 215 (1974) ..... *passim*

Windward Shipping v. *American Radio Association*, 415 U.S. 104 (1974) ..... *passim*

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REPLY BRIEF FOR PETITIONERS

The submissions by the Solicitor General, by the respondent, and by amici, the American Farm Bureau Federation (AFBF) and Occidental Chemical Company ("Occidental"), fail entirely in their attempts to demonstrate federal labor law jurisdiction, the threshold question presented in the case. Each offers its own theory why the holding in *Windward Shipping* v. *American Radio Association,* 415 U.S. 104 (1974) and *American Radio Association* v. *Mobile Steamship Association,* 419 U.S. 215 (1974) should not be followed here. None presents a tenable rationale when measured against this Court's controlling decisions.[1]

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[1] The secondary boycott and First Amendment issues in this case differ from the jurisdictional issue in that they have no clear-cut precedent like *Windward/Mobile* against which the parties' analyses can be tested. The contentions of respondent and its supporting amici on these issues are rebutted in petitioners' main brief. The arguments need not be repeated.

In the light of respondent's concession that the court of appeals did not direct the entry of summary judgment against petitioners, the summary judgment question is no longer at issue.

The crux of the Solicitor General's argument on the jurisdictional issue, which mirrors the position of the National Labor Relations Board, is that "[t]he union activity in *Windward* and *Mobile* consisted of *primary* picketing directed at the employment conditions of foreign seamen on foreign ships, conduct outside the Board's jurisdiction. Although the same picketing affected domestic employers, this effect was merely an incident of the ship picketing which was beyond the Board's reach." Brief for the United States as Amicus Curiae, at 15-16 (emphasis added). In this case, the Solicitor General contends, "the union engaged exclusively in purely *secondary* activity against employers subject to the Board's jurisdiction. Since this is the only activity involved, there is no need, as there was in *Windward/Mobile,* to separate the domestic secondary effects from activity over which the Board lacked jurisdiction." *Id.* at 16 (emphasis added).

The Solicitor General misinterprets both the unions' action and this Court's analysis in *Windward* and *Mobile.* Those cases involved a single act—picketing to protest the substandard wages paid to foreign seamen on foreign flag ships. In determining whether that activity was outside the reach of the Labor Management Relations Act (LMRA), this Court did *not* inquire whether the union protest, or any aspect of it, could be characterized as "primary" activity against foreign shipowners or "secondary" activity against domestic employers, as those terms are used in applying the secondary boycott provisions of the LMRA. Rather, as demonstrated in petitioners' main brief (see also Brief for the AFL-CIO as Amicus Curiae), the focus of this Court's inquiry in *Windward* and *Mobile* was on whether the underlying dispute was a domestic labor dispute or a foreign dispute implicating the "delicate field of international relations." *Windward,* 415 U.S., at 110. Spe-

cifically, *Windward* and *Mobile* held that, when the union's concern is with the practices of foreign nationals and when the union's action has potential international implications going beyond "the sort of wage-cost decision benefitting American workingmen which the LMRA was designed to regulate," *id.* at 115, then the union's action is *not* "in commerce" as defined in the LMRA and is not regulated by the Act.

Under this Court's analysis it is immaterial whether the union action at issue could be characterized as "primary" or "secondary." In *Mobile,* the union's action exerted economic pressure on domestic employers. Indeed, that pressure was "a crucial part of the mechanism by which the maritime operations of the foreign ships were to be affected." *Mobile,* 419 U.S. at 224. The union's action was held beyond the reach of the Act not by virtue of a supposed distinction based on the primary/secondary dichotomy, but because the "*same* pressure upon foreign flag owners [would] result if longshoremen refuse[d] to load or unload their ships" as would result if American shippers ceased patronizing their ships. *Id.* at 225 (emphasis added). Thus, there is no support in this Court's decisions for the conclusion that only activity that can be classified as "primary" can have those implications for foreign trade and international relations that counseled against extension of the Act's coverage in *Windward* and *Mobile.*

This becomes all the more plain when it is remembered that the claims of *preemption* in *Windward* and *Mobile* posed questions as to whether the challenged union action could be characterized as protected "primary" activity (*Windward*) or prohibited "secondary" activity (*Mobile*) for purposes of applying the substantive provisions of the LMRA. In each case, this Court disposed of the

controversy short of any inquiry into these issues, stating in *Windward* that "[s]ince we hold that respondents' picketing was not 'in commerce' as defined by the Act, we do not reach the question of whether the activity was otherwise of such a nature that state courts would be precluded by the LMRA from entertaining an action to enjoin it." 415 U.S. at 115. These cases turned on the threshold question of whether the challenged union action—in light of the nature of the underlying dispute and the attendant implications of the union activity for international trade and foreign relations—is beyond the regulatory reach of the federal labor laws.

The contentions of respondent and its supporting amici curiae on the jurisdictional issue are readily dismissed. Respondent's two-step acid test for jurisdiction would inquire into whether the union's conduct is arguably protected by Section 7 of the Act and if so, whether foreigners will find the result offensive. Respondent's Brief at 25. Merely to recite this test is to establish that it is alien to the analysis of *Windward* and *Mobile*. In those cases, this Court did not even consider whether the union action in issue would have been protected or prohibited had the LMRA applied at all.

AFBFs' position is that union activity is exempt from the coverage of the NLRA when it is in furtherance of an underlying *labor* dispute with a foreign shipowner but not when it relates to a foreign controversy of another kind. As shown in petitioners' main brief, at 12, union activity is *more* clearly outside the coverage of the federal labor laws when it concerns international military conflict than when it concerns international problems. (See also brief for the AFL-CIO as Amicus Curiae, at 8-10).

Occidentals' argument that *Windward* and *Mobile* should be restricted to identical situations involving labor rela-

tions aboard foreign ships (Occidental Brief, at 10-17) has already been addressed. Petitioners' main brief at 15, or 13 and 14. Occidental's claim that comity requires only the avoidance of conflict with foreign labor and maritime law (Occidental brief at 19) is but a variant on respondent's two-step test,—a thinly disguised policy argument designed to predetermine the outcome so that the union loses and, in this case, so that the Soviet Union prevails.

Windward and *Mobile* then, properly viewed, preclude application of the LMRA to the union's action here. This case, like *Windward* and *Mobile,* involves a single act by a union. The impetus for that action, and the focus of the union's concern, was Soviet aggression abroad—a matter totally outside domestic labor relations. The union's response—a suspension in the handling of all Russian ships and all cargo bound for or arriving from Russia—was directed towards the Soviet Union, with significant implications for its foreign policy. The union's concern could not be accommodated by the "sort of wage-cost decision benefitting American workingmen which the LMRA was designed to regulate." Under *Windward* and *Mobile,* the effect of the union's action on Soviet trade agencies and the Soviet government, as well as the effect on domestic shippers, stevedores, and importers are therefore beyond the reach of the LMRA. As this Court held in *Mobile,* it will not permit "a bifurcated view of the effects" of a single labor action. 419 U.S. at 222.

For the foregoing reasons and for the reasons set forth in petitioners' main brief, the judgment of the court of appeals should be reversed.

Dated: New York, New York
January 11, 1982

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On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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AUTHORITIES CITED

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Allied International Inc. v. International Longshoremen's Association, AFL-CIO, 640 F.2d 1368 (1st Cir. 1981) 3, 4, 5, 7, 12, 15
American Radio Association v. Mobile Steamship Association, 419 U.S. 215 (1974) 4, 6, 8, 10, 11, 12, 17, 22
A Quaker Action Group v. Morton, 516 F.2d 717 D.C. Cir. 1975) 23
Baldovin v. International Longshoremen's Association AFL-CIO, 626 F.2d 445 (5th Cir. 1980) 2, 3, 21, 24
Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957) 4, 8, 11, 12, 15
Board of Education of Central School District No. 1 v. Allen, 392 U.S. 236 (1968) 27
Brown ex rel. N.L.R.B. v. American Federation of Television and Radio Artists, 191 F. Supp. 676 (N.D. Cal. 1961) 24
Bullock v. Mumford, 509 F.2d 384 (D.C. Cir. 1975) 23
Carey v. Brown, —— U.S. ——, 100 S. Ct. 2286 (1980) 26
Cohen v. California, 403 U.S. 15 (1971) 23
Gillette v. United States, 401 U.S. 437 (1970) 26, 27
Grain Elevator, Flour and Feed Mill Workers, International Longshoremen's Associaiton, Local 418, AFL-CIO v. N.L.R.B., 376 F.2d 774 (D.C. Cir.), *cert. denied*, 389 U.S. 932 (1967) 11, 12, 19
Harrington & Company, Inc. v. ILA, 356 F. Supp. 1079 (S.D. Fla. 1973) 16
Incres Steamship Company, Ltd. v. International Maritime Workers Union, et al., 372 U.S. 24 (1963) 4, 8, 9, 13

AUTHORITIES CITED—Continued

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International Brotherhood of Electrical Workers, Local 501 v. N.L.R.B., 341 U.S. 694 (1951) 7, 18, 22, 23

International Longshoremen's Association, AFL-CIO v. Ariadne Shipping Company, 397 U.S. 195 (1970) 4, 8, 10, 11, 12

International Longshoremen's Association, AFL-CIO, etc., (Shipside Packing Company, Inc.), 227 NLRB 659 (1976) 19

International Longshoremen's Association (Allied International, Inc.), 257 NLRB No. 151 (1981) .. 6, 12, 13, 14, 15, 16, 17, 19, 21

International Longshoremen's Association, AFL-CIO (Kansas Farm Bureau), NLRB-JD-99-81 (1981) 18, 19

Joyce v. United States, 454 F.2d 971 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 969 (1972) 23

Local 399, International Brotherhood of Electrical Workers, 235 NLRB 555 (1978) 19, 23, 24

Local 418, Sheet Metal Workers International Ass'n, AFL-CIO, 235 NLRB 144 (1978) 20

Local 732, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 229 NLRB 392 (1977) 18

Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO v. N.L.R.B., 366 U.S. 667 (1961) 21

Local 1355, International Longshoremen's Association (Ocean Shipping Service, Ltd.), 146 NLRB 723, *enforcement denied*, 332 F.2d 992 (4th Cir. 1964) 3, 13, 17, 20, 22

Madden v. Grain Elevator, Flour and Feed Mill Workers, International Longshoremen's Association, Local 418, 334 F.2d 1014 (7th Cir. 1964), *cert. denied*, 379 U.S. 967 (1965) 11, 12

McCulloch v. Sociedad Nacional, etc., 372 U.S. 10 (1963) 4, 8, 9, 11, 15

AUTHORITIES CITED—Continued

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Mountain Navigation Co. v. Seafarer's International Union of North America, 348 F. Supp. 1298 (W.D. Wis. 1971) 16

N.L.R.B. v. International Longshoremen's Association and Local 1355, 332 F.2d 922 (4th Cir. 1964) 13, 15, 19

N.L.R.B. v. Denver Building and Construction Trades Council, et al., 341 U.S. 675 (1951) 17

N.L.R.B. v. Local Union No. 3, International Brotherhood of Electrical Workers, AFL-CIO, 477 F.2d 260 (2nd Cir. 1973), *enforcing* 197 NLRB 328 (1972) 18, 24

N.L.R.B. v. Local 85, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, 454 F.2d 875 (9th Cir. 1972), *enforcing* 180 NLRB 709 (1970) 19

N.L.R.B. v. Local 825, International Union of Operating Engineers (Burns and Roe, Inc.), 400 U.S. 297 (1971) 19

N.L.R.B. v. Local 825, International Union of Operating Engineers, AFL-CIO, 315 F.2d 695 (3rd Cir. 1963) 20

N.L.R.B. v. Retail Store Employees Union Local 1001, 447 U.S. 607 (1980) 6, 20, 21, 22, 26

National Maritime Union of America (Delta Steamship Lines, Inc.), 147 NLRB 1328 (1964), *enforced National Maritime Union v. N.L.R.B.*, 346 F.2d 411 (D.C. Cir. 1965), *cert. denied*, 382 U.S. 840, *reh. denied*, 382 U.S. 933 (1965) 16, 24

National Maritime Union of America (Shippers Stevedoring Company), 245 NLRB 149 (1979) .. 13, 14, 24

National Maritime Union of America, AFL-CIO, (The Weyerhaeuser Co.), 147 NLRB 1317 (1964), *enforced, National Maritime Union v. N.L.R.B.*, 342 F.2d 538 (2nd Cir. 1965), *cert. denied*, 382 U.S. 835 (1965) 16

AUTHORITIES CITED—Continued

Page

New Orleans Steamship Association v. General Longshore Workers ILA Local Union No. 1418, 626 F.2d 445 (5th Cir. 1980) 24
Orange County District Council of Carpenters, 242 NLRB 587 (1979) 18
Penello v. International Longshoremen's Association, 227 F. Supp. 164 (D. Md. 1964) 20
Police Department of Chicago v. Mosley, 408 U.S. 92 (1972) 26
Schneider v. Irvington, 308 U.S. 147 (1939) 25
Seafarers International Union of North America, Atlantic and Gulf District, Harbor and Waterways Division v. N.L.R.B., 265 F.2d 585 (D.C. Cir. 1959) 21
Sherbert v. Verner, 374 U.S. 398 (1963) 27
Teamsters Union v. Vogt, Inc., 354 U.S. 284 (1957) 22
Thomas v. Review Board of Indiana Employment Security Division, —— U.S. ——, 101 S. Ct. 1425 (1981) 27
United Brotherhood of Carpenters, Local 1245, 229 NLRB 236 (1977) 8
U.S. v. Crosson, 462 F.2d 96 (9th Cir.), *cert. denied*, 409 U.S. 1064 (1972) 23
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-1663

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, *et al.*,

Petitioners,

v.

ALLIED INTERNATIONAL, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF AMICUS CURIAE OF THE AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF RESPONDENT

The American Farm Bureau Federation, with the written consents of all parties,[1] respectfully submits this brief as Amicus Curiae in support of the Respondent.

INTEREST OF THE AMICUS CURIAE

The American Farm Bureau Federation is a voluntary general farm organization organized in 1919 under the "General Not For Profit Corporation Act" of the State of Illinois. The purpose of the American Farm Bureau Federation is the promotion, protection and representation of the business, economic, social and educational interests of the farmers and ranchers of the United States. It has member State Farm Bureau organizations in 48 states and in Puerto Rico, representing more than 3 million member families.

[1] Their consents have been filed with the Clerk of the Court.

The American Farm Bureau Federation is vitally concerned with the propensity of the International Longshoremen's Association leadership to order secondary boycotts to exert leverage in support of political or other goals unrelated to any primary labor dispute. Such leverage is substantial: each of the grain ships affected by such boycotts carries a multimillion dollar cargo, and the ILA's refusal to load that cargo leads to disrupted business arrangements and financial losses not only for the shipping and stevedoring companies but for the grain elevators, the rail and truck transporters, and the farmers themselves.[2]

In 1975, as in 1980, the American Farm Bureau Federation, along with the Kansas Farm Bureau and the Texas Farm Bureau, filed charges with the National Labor Relations Board's Regional Office in Houston alleging that the International Longshoremen's Association, the ILA's South Atlantic & Gulf Coast District, and ILA Locals 872 and 1273 had violated Section 8(b)(4) of the National Labor Relations Act by engaging in a boycott of grain bound for the Soviet Union.[3]

Today, as in 1975, the American Farm Bureau Federation seeks to protect the economic interests of this nation's farmers from the ILA's inclination to use farm products as a pawn in the Union's machinations. Given

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[2] "The ILA refusal to work . . . has affected the farmers who produce the grain, the transportation companies who move it to ports, and the stevedores who load it aboard vessels." *Baldovin v. International Longshoremen's Association, AFL-CIO*, 626 F.2d 445, 448 (5th Cir. 1980).

[3] Pursuant to the parties' Settlement Stipulation (drafted by the Board's General Counsel), the Board on June 22, 1976, issued a Decision and Order [DS-857, unreported] requiring that the ILA and the other respondents abandon their boycott. *See Baldovin v. International Longshoremen's Association, AFL-CIO, supra*, 626 F.2d at 448, n. 2, which inaccurately asserts that the settlement was concluded "before the case reached the Board." The American Farm Bureau Federation, the Kansas Farm Bureau, and the Texas Farm Bureau were also the charging parties in the unfair labor practice proceedings related to *Baldovin*, 626 F.2d at 448.

the Union's established predeliction for instituting secondary boycotts as a means of expressing its political positions,[4] the American Farm Bureau Federation is concerned that the ILA will continue to call boycotts for those purposes unless this Court makes it clear that such conduct is forbidden by the National Labor Relations Act.

STATEMENT OF THE CASE

At a press conference in New York on January 9, 1980, ILA President Thomas W. Gleason issued a statement ordering ILA members to suspend handling cargo bound to or from Russia.[5] Gleason "estimated that the boycott would affect hundreds of millions of dollars in direct shipments between the United States and the Soviet Union and in Soviet cargo shipped through foreign ports."[6] Furthermore, "[i]n making Soviet goods 'hot cargo,' Gleason maintained that he did not want to 'embarass or second guess' [President] Carter and said that he would respect any requests that might come from the president."[7] When he met with President Carter

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[4] *See* ILA's Petition For A Writ of Certiorari (ILA cert. pet.) at 12-13; ILA's Brief For Respondents-Appellees-Appellants to the Fifth Circuit in *Baldovin v. I.L.A.*, *supra* (ILA Brief to Fifth Circuit) at 26-27. And *see Local 1355, International Longshoremen's Association (Ocean Shipping Service, Ltd.)*, 146 NLRB 723, *enforcement denied*, 332 F.2d 992 (4th Cir. 1964) (ILA's boycott of ships used in trade with Cuba).

[5] The text of Gleason's statement appears in *Allied International, Inc. v. International Longshoremen's Association, AFL-CIO*, 640 F.2d 1368, 1369 n. 2 (1st Cir. 1981).

[6] Inman, *Dockworkers To Boycott Ships, Cargo for Russia*, Houston Post, Oct. 10, 1980, at 27, Col. 3.

[7] *Id.* at Col. 2. And *see ILA Refuses To Work Russian Ships, Move Russian Cargo*, 6 Daily Lab. Rep. A-6-A-7, Jan. 7, 1980. On January 7, 1980, President Carter, responding to the Soviet invasion of Afghanistan, had announced that no agricultural product may be exported to the Soviet Union except under validated export licenses issued to cover unshipped grain committed under the 1975 agreement between the United States and the Soviet Union. *See* "Weekly Compilation of Presidential Documents," Vol. 16, No. 2, Mon., Jan. 14, 1980, pp. 25-27, 32-33.

eight days later, however, and "was told that his union's actions are 'clogging the pipeline and interfering with commerce' and are 'unfair to farmers who need to move their grain,' "[8] Gleason failed to call the boycott off.

As Gleason's directive required, the boycott was implemented in all Atlantic and Gulf Coast ports wherever ILA longshoremen handle cargo, forcing a variety of American companies, completely "neutral" to the ILA's "dispute" with the Soviet Union, to cease doing business with each other vis-a-vis cargo bound to or from Russia. Allied International, Inc., an importer of wood products from the Soviet Union, filed the complaint in the instant case, alleging, *inter alia*, that the ILA's actions violated Section 8(b)(4) of the National Labor Relations Act,[9] and that Allied was thus entitled to damages under Section 303 of the Act.[10]

As fully set forth in its decision,[11] the United States Court of Appeals for the First Circuit reversed the district court's dismissal of Allied's NLRA claims,[12] and held that: (1) the Supreme Court's "foreign flag" decisions,[13] which deny NLRA jurisdiction in situations in-

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[8] *Carter Urges ILA To Send Remaining Grain To Soviets*, 13 Daily Lab. Rep. A-8, Jan. 10, 1980.

[9] The text of Section 8(b)(4)(i) and (ii)(B) appears in Appendix A.

[10] The text of Section 303 appears in Appendix B.

[11] *Allied International, Inc. v. International Longshoremen's Association, AFL-CIO*, 640 F.2d 1368 (1st Cir. 1981).

[12] *Allied International, Inc. v. International Longshoremen's Association*, 492 F.Supp. 334 (D. Mass. 1980), relying on *Walsh v. International Longshoremen's Association*, 488 F.Supp. 524 (D. Mass. 1980).

[13] *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138 (1957); *McCulloch v. Sociedad Nacional, etc.*, 372 U.S. 10 (1963); *Incres S.S. Co. v. International Maritime Workers Union*, 372 U.S. 24 (1963); *International Longshoremen's Local 1416, AFL-CIO v. Ariadne Shipping Company*, 397 U.S. 195 (1970); *Windward Shipping (London) Ltd. v. American Radio Association, AFL-CIO*, 415 U.S. 104 (1974); *American Radio Association, AFL-CIO v. Mobile Steamship Association, Inc.*, 419 U.S. 215 (1974).

volving American labor unions' labor disputes or labor objectives concerning foreign crews of foreign ships, are inapplicable to the instant case since "[t]here is no question of interference in the affairs of a foreign employer;" [14] (2) "the ILA leadership directed ILA members . . . to engage in a concerted refusal to handle a certain class of goods . . .";[15] (3) "the object of a boycott, for purposes of section 8(b)(4)(ii)(B), can be inferred from the virtually inevitable results generated by it, at least when, as here, the union's conduct can under no reading of the facts be characterized as 'primary activity' protected by the Act";[16] (4) "when a union orders all employees of a neutral employer to cease handling goods originating from a particular source, it is *a fortiori* forcing that employer to 'cease doing business with' that source";[17] (5) absence of a primary labor dispute does not preclude National Labor Relations Board jurisdiction over a union's secondary boycott conduct;[18] (6) application of Section 8(b)(4) to "national boycotts undertaken as a form of 'political expression'" deprives neither ILA leaders nor members of their statutory or constitutional rights of expression;[19] and (7) the ILA's boycott violates Section 8(b)(4) as alleged.[20]

SUMMARY OF ARGUMENT

In its "foreign flag" decisions,[21] this Court has established the principles that considerations of international

[14] *Allied International, supra*, 640 F.2d at 1371-74.

[15] *Id.* at 1374.

[16] *Id.* at 1375-76. And *see id.* at 1377 ("we think it plain that the ILA was not engaged in primary activity and that the boycott . . . was 'calculated to satisfy union objectives elsewhere.'"). *Compare Walsh v. I.L.A., supra*, 488 F.Supp. at 531 ("this a primary boycott of Russian goods, with incidental effects upon those employers who deal in such goods.").

[17] 640 F.2d at 1377-78.

[18] *Id.* at 1377-78. And *see* fn. 70 below.

[19] *Id.* at 1378-79.

[20] *Id.* at 1379.

[21] *See* fn. 13, *supra*.

comity preclude intrusion of National Labor Relations Act jurisdiction into international maritime labor disputes, and therefore, that the NLRB may not assert jurisdiction over either a union's primary labor dispute concerning the foreign crew members of a foreign-owned ship [*Windward, supra*, 415 U.S. at 115] or the secondary effects of such a dispute upon neutral domestic employers. *Mobile, supra*, 419 U.S. at 224-25. The Court has emphasized, however, that where foreign shipboard labor relations are not at issue, "the Board has jurisdiction under § 8(b)(4) of domestic secondary activities which are in commerce, even though the primary employer is located outside the United States." *Id.* at 225, n. 10.

Since the instant case involves no primary employer and no primary labor dispute, but only secondary boycott activity in furtherance of the ILA's "dispute" with the Soviet Union, this Court's "foreign flag" concerns regarding interference with international martime labor relations are not germane to the jurisdictional issue here. Furthermore, as the NLRB and most courts have held, the absence of a primary labor dispute does not deprive the Board of jurisdiction over a union's secondary boycott.[22] Accordingly, there is no barrier to the assertion of Section 8(b)(4) jurisdiction in this case.

The ILA's conduct, including Thomas W. Gleason's order instituting the boycott and the refusal of the ILA locals to refer longshoremen to handle cargo bound to or from Russia, induced ILA members to engage in a concerted refusal to handle such cargo and thus coerced or restrained a variety of neutral employers. And since it was reasonably foreseeable that the boycott would force neutral employers to cease doing business vis-a-vis Soviet cargo, an unlawful object of forcing such a cessation of business may be inferred. *N.L.R.B. v. Retail Store Employees Union, Local 1001*, 447 U.S. 607 (1980).

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[22] *See International Longshoremen's Association, AFL-CIO (Allied International, Inc)*, 257 NLRB No. 151 (1981), slip op. at 11-13, and cases cited therein.

Finally, contrary to the ILA's claims, the boycott is not protected by the First Amendment. *International Brotherhood of Electrical Workers, Local 501 v. N.L.R.B.*, 341 U.S. 694 (1951).

In sum, the court below correctly held that the ILA has violated Section 8(b)(4)(B) by instituting and maintaining a secondary boycott of cargo bound to or from Russia.

ARGUMENT

I. This Court's "Foreign Flag" Decisions Do Not Preclude National Labor Relations Act Jurisdiction Over A Union's Domestic Secondary Boycott Activity When The Union's Conduct Is Not In Furtherance of a Primary Labor Relations Dispute Or Objective Concerning the Foreign Crew Members of Foreign-Owned Vessels.

A. The "Foreign Flag" Cases Are All "Labor Dispute" Cases, and the Court's Withholding of Jurisdiction Has Been Grounded In International Comity Considerations Regarding the Impropriety of Intruding Domestic Labor Act Jurisdiction Into Foreign Maritime Labor Disputes.

As the court below correctly found, this Court's "foreign flag" holdings,[23] which delineate "the threshold of interference with the maritime operations of foreign vessels which makes the [Act] inapplicable,"[24] do not preclude the assertion of NLRA jurisdiction over the ILA's boycott activities in the instant case.[25]

In its "foreign flag" decisions, this Court has held that American unions' labor disputes or labor relations objectives vis-a-vis foreign shipowners and their foreign crews are beyond the jurisdiction of the NLRB because assertion of such jurisdiction would intrude the domestic labor law into the maritime operations of foreign ves-

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[23] *See* n. 13, *supra*.

[24] *Allied International, supra*, 640 F.2d at 1372, quoting *Windward, supra*, 415 U.S. at 114.

[25] *Allied*, 640 F.2d at 1371-74.

sels, contrary to "longstanding principles of comity and accommodation in international trade."[26] Furthermore, where a union's conduct in furtherance of its primary labor objective or dispute with a foreign shipowner is beyond the Act's jurisdiction,[27] the effects of that conduct upon neutral "secondary" employers are also beyond the Act's jurisdiction.[28]

The central focus of all the "foreign flag" cases is some sort of labor dispute. In each case, one or more American unions were attempting to achieve a labor-oriented goal vis-a-vis employees of foreign shipowners.[29] In *Windward* and *Mobile*, as this Court observed, the union's objective was to protest the undermining of area standards by foreign shipowners and, hopefully, to force

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[26] *Windward*, 415 U.S. 112-13. And *see* the Court's summary of its holdings in *Benz*, *McCulloch*, *Incres*, and *Ariadne* at 415 U.S. 109-113.

[27] *Windward*, 415 U.S. at 115.

[28] *Mobile*, 419 U.S. 224-25.

[29] Picketing to support striking foreign employees of foreign shipowners (*Benz*); organizational picketing seeking to represent foreign employees of foreign shipowners (*Incres*); seeking to represent foreign employees of foreign shipowners in a Board-ordered election (*McCulloch*); protesting wages paid by foreign shipowners to U.S. longshoremen servicing foreign ships (*Ariadne*); and picketing to protest foreign shipowner's payment of "substandard" wages to foreign crewmen (*Windward* and *Mobile*). The facts of *Windward/Mobile* show that the union, which was concerned with declining jobs caused by the "competitive advantage enjoyed by [foreign] vessels because of the differences between foreign and domestic seamen's wages" [*Windward*, 415 U.S. at 106-107], essentially was engaging in what is known as "area standards" picketing. *See, e.g., United Brotherhood of Carpenters, Local 1245*, 229 NLRB 236, 240 (1977). In *Windward*, foreign shipowners undermined United States mariners' job opportunities by paying wages below area standards and thus gained a competitive advantage in the shipping market. As the union's picket signs proclaimed, "the wages and benefits paid seamen aboard the vessel . . . are substandard to those of American seamen. This results in extreme damage to our wage standards and loss of our jobs. . . ." *Windward*, 415 U.S. at 107; *Mobile*, 419 U.S. at 217, n. 2.

those shipowners to raise their costs, including wage costs, so as to eliminate the competitive edge they derived from paying low wages to their foreign crews.[30] Furthermore, from the facts of *Incres* and *McCulloch*, it is apparent that the American maritime unions' *first* line of attack had been to organize such foreign crews.[31] Presumably, had they been successful in such organizing efforts, the unions in those cases would have attempted to negotiate wage increases for the foreign crews.

In *Windward*, the Court considered the possibility that foreign shippers might respond to the picketing by taking action, *other than* raising wages, that would affect their maritime operations. But the Court stressed that, of all the possible "predictable responses," wage increases would have the greatest impact on "maritime operations":

> A decision by the foreign owners to raise foreign seamen's wages to a level mollifying the American pickets would have the *most significant and far-reaching effect on the maritime operations* of these ships throughout the world.[32]

The effects of the shippers' other possible responses were described by the Court in far less dramatic terms.[33]

The crucial issue in all of the "foreign flag" cases is whether the union's conduct crosses the "threshold of interference with the maritime operations of foreign vessels which makes the LMRA inapplicable."[34] If the

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[30] *See* n. 29, *supra*.

[31] Thus, National Maritime Union of America, AFL-CIO, filed the representation petition in *McCulloch*, 372 U.S. 10, 13, and International Maritime Workers Union, "an American labor organization formed by two other American unions for the primary purpose of organizing foreign seamen on foreign-flag ships," engaged in the organizational picketing in *Incres*. 372 U.S. at 25-26.

[32] *Windward*, 415 U.S. at 114 (emphasis supplied).

[33] *Windward*, 415 U.S. at 114-115.

[34] *Id.* at 114.

Court in these cases has not treated "maritime operations" as conceptually identical with "labor relations," it clearly has viewed labor relations as the central and most significant aspect of such operations. The majority in *Mobile* emphasized the primacy of the labor relations aspect of maritime operations in its rejection of the dissent's suggestion that the majority's rationale required reversal of *Ariadne* since that case "held that longshoremen servicing 'foreign flag' vessels in American ports are 'in commerce' . . . ." [35] The majority countered by observing that in contrast to the situation in *Ariadne*, where the pickets protested wages paid to fellow American longshoremen, "[h]ere the picketing which triggered the dispute was not directed toward any wages or conditions of employment of the longshoremen. It was instead directed to substandard wages being paid to the crews of 'foreign-flag' vessels throughout those vessels' worldwide maritime operations." [36] In the Court's view, it was *this* "effect," which, of course, bears directly upon employer-employee relations on foreign vessels, that crossed the threshold of interference with maritime operations and rendered the LMRA inapplicable.[37]

The ILA reads this Court's *Windward* and *Mobile* decisions as holding that Section 8(b)(4) jurisdiction is obviated whenever a union's domestic secondary boycott is in furtherance of any kind of "dispute" with *any* kind of foreign "entity." [38] The ILA's interpretation thus assumes that a primary labor dispute or labor relations objective is irrelevant to the Court's *Windward-Mobile*

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[35] *Mobile*, 419 U.S. at 223, fn. 9.

[36] *Id.*

[37] *Id.*

[38] *See* ILA cert. petition at 6-8. The only kind of dispute between an "American union and a foreign entity" which the ILA concedes to be jurisdictional is that in *Ariadne*—a "dispute over the hiring in United States ports of unionized American labor." *Id.* at 6, n. 3. And *see* ILA's "Brief For Petitioners" ("ILA Brief" or "Brief") at 5, 10, 19-21).

rationale, and, therefore, that the principles developed by this Court in *Benz* through *Ariadne*[39] are irrelevant as well. If the ILA were correct, the pre-*Windward* cases could have been decided simply on the issue of whether the union had a dispute with a foreign "entity" whose "predictable responses" would not beneficially effect American workingmen's wages,[40] regardless of whether assertion of Board jurisdiction would raise conflicts with foreign labor laws[41] or would require inquiry into labor disputes between foreign shipowners and their foreign crews.[42]

But the language of the *Windward/Mobile* decisions simply does not support the notion that the Court was

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[39] *See* the discussion above, pp. 7-10.

[40] ILA Brief at 9.

[41] *McCulloch*, 372 U.S. at 20-22.

[42] *Benz*, 353 U.S. at 143. The ILA's analysis also ignores this Court's statement in *Mobile* that its holding there "cast no doubt" upon *Madden v. Grain Elevator, Flour and Feed Mill Workers, International Longshoremen Assn., Local 418*, 334 F.2d 1014 (7th Cir. 1964), *cert. denied* 379 U.S. 967 (1965), and *Grain Elevator, Flour and Feed Mill Workers, International Longshoremen Assn., Local 418, AFL-CIO v. N.L.R.B.*, 376 F.2d 774 (D.C. Cir.), *cert. denied*, 389 U.S. 932 (1967), which recognized "that the Board has jurisdiction under § 8(b)(4) of domestic secondary activities which are in commerce, even though the primary employer is located outside the United States." 419 U.S. at 225, n. 10. That the Court's specific preservation of Board jurisdiction in cases like *Madden* and *Grain Elevator Workers* rests upon the factual differences between those cases and *Windward/Mobile* demonstrates that the Court's rationale for denying jurisdiction over the "domestic secondary activities" in *Mobile* is closely tied to the facts of that case. As the majority in *Mobile* put it, where "picketing activities. . . *so directly affect* the maritime operations of foreign vessels," the Board will not have jurisdiction over either the primary picketing or its secondary effects. 419 U.S. at 228 (emphasis supplied). Where the only conduct at issue, however, is "domestic secondary activity which is in commerce" (as in *Madden/Grain Elevator Workers*), it is apparent that the Court does not view such activity as directly affecting maritime operations so as to negate Board jurisdiction.

abandoning or rendering irrelevant the principles enunciated in *Benz* through *Ariadne*. Rather, those principles obviously are the foundation upon which the *Windward/Mobile* rationale is built and play a necessary part in the jurisdictional analysis.[43]

B. Where There Is No Foreign Maritime Labor Dispute, But Only Domestic Secondary Activity, the Court's "Foreign Flag" Concerns Are Irrelevant and the Board Has Jurisdiction Even If the "Primary" Is Located Outside the United States.

The court below perceived the central labor relations focus of this Court's "foreign flag" rulings and viewed *Windward/Mobile* as establishing the principle that:

> [I]n a case involving *intertwined* "primary" and "secondary" *labor* disputes, lack of Board jurisdiction over the primary dispute will preclude Board jurisdiction over the secondary conduct—more particularly where a contrary rule might well suggest an improper interference by the United States in the relationship between foreign employers and laborers.[44]

The court observed that, as in *Madden* and *Grain Elevator Workers*,[45] "application of Section 8(b)(4) here would portend no interference in the management or affairs of foreign companies, workers, or labor organizations. This case is thus far removed from the situation that faced the court in *Mobile*."[46] Because "[t]he *only* labor-related activity in issue has been played out by an all-American cast,"[47] the "foreign flag" principles are inapplicable here.

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[43] For the Board's summary of this Court's "foreign flag" holdings, *see International Longshoremen's Association, AFL-CIO (Allied International, Inc.)*, 257 NLRB No. 151, slip op. at 15.

[44] *Allied International*, 640 F.2d at 1374, n. 4 (emphasis in original). And *see, International Longshoremen's Assn. (Allied International, Inc.)*, 257 NLRB No. 151, slip op. at 18-21, 23.

[45] *See* fn. 42, *supra*.

[46] *Allied*, 640 F.2d at 1374.

[47] *Id.* at 1373.

The court's conclusion that neutral employers in these circumstances are entitled to the Act's protection was endorsed by the NLRB in its decision in the related unfair labor practice case.[48] Moreover, the Board's *Allied* holding is consistent with its 1964 assertion of jurisdiction over an earlier ILA political boycott of vessels used in trade with Cuba, *Local 1355, International Longshoremen's Association (Ocean Shipping Service, Ltd.)*.[49] Rejecting the ILA's contention there that *Incres et al.* precluded NLRB jurisdiction because the vessel at issue was a foreign ship with an alien crew, the Board made it clear that this Court's foreign flag concerns were not applicable.[50]

Although the Fourth Circuit reversed the Board's jurisdictional holding on other grounds, the court agreed with the Board that this Court's "foreign flag" rulings did not foreclose jurisdiction over the ILA's conduct.[51] Similarly, in its *Allied* decision, the Board emphasized that *Ocean Shipping* is "in harmony with the Supreme Courts' rulings in *Windward* and *Mobile*."[52] It is thus apparent that today, as in 1964, the ILA's non-labor "dispute" with a foreign "entity"[53] is irrelevant to the issue of Board jurisdiction over the Union's secondary boycott activities.[54] Holding those activities unlawful

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[48] *See Allied International, supra*, 257 NLRB No. 151, slip op. at 23-24; and *see id.* at 9, nn. 12 & 13; 15; 36.

[49] 146 NLRB 723 (1964), *rev'd. sub nom. N.L.R.B. v. International Longshoremen's Association and Local 1355*, 332 F.2d 922 (4th Cir. 1964).

[50] 146 NLRB at 724, fn. 3.

[51] *N.L.R.B. v. I.L.A., supra*, 332 F.2d at 995.

[52] 257 NLRB No. 151, slip op. at 24. And *see id.* at 35.

[53] *See* fn. 70 below.

[54] The ILA claims [cert. pet. at 9; Brief at 15, n. 13; 16] that assertion of NLRA jurisdiction over its boycott also conflicts with the Board's holding in *National Maritime Union of America (Shippers Stevedoring Company)*, 245 NLRB 149 (1979). The Board, however, rejected this contention in its *Allied* decision, indicating

would *not* "resolve labor disputes between nationals of other countries operating ships under foreign

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that *Shippers*, unlike the instant case, falls within the *Windward/Mobile* limitation on jurisdiction because the union there sought to compel "the total replacement of the foreign ship and its foreign crew with an American ship and its American crew. . . . [T]he dispute *directly* intruded into the maritime operations of a foreign ship." [257 NLRB No. 151, slip op. at 22, n. 29, emphasis in original.]

While the amicus agrees with the Board that *Shippers* is not controlling here, it disagrees with the Board's analysis of that case and maintains that *Shippers* was itself incorrectly decided. As set forth by the NLRB's Administrative Law Judge, the facts of *Shippers* do not raise the kinds of issues that concerned this Court in the "foreign flag" cases. No labor dispute was involved. The union in *Shippers* picketed a Russian vessel, not in order to influence shipboard labor relations of Russia or of any foreign shipper, but rather to protest the alleged failure of the United States Department of Transportation to comply with the "Merchant Marine Act's law of cargo preference" which required that a certain proportion of imported cargo purchased by the United States Government be carried on American ships. The union so stated its purpose, prior to engaging in its picketing, both to the press and to the stevedoring company affected. And the union called off its pickets when it received assurances from the Department of Transportation that the government would comply with the cargo preference requirements. 245 NLRB at 150-52. In spite of these facts, however, the Board in *Shippers* adopted the ALJ's holding that the union's picketing "was not picketing in commerce within the meaning of the LMRA" (*Id.* at 157), apparently because none of the Russian shipowners' "predictable responses" would benefit American seamen represented by the union (*Id.*).

The impropriety of focusing upon a foreign shipowner's "predictable responses" in assessing the jurisdictional issue is demonstrated by the facts of *Shippers*: the responses of Russian shipowners were *irrelevant*, since the union's objectives could be satisfied (and ultimately were satisfied) *only* by the "response" of an agency of the United States Government. Furthermore, the full extent (and object) of the union's effect upon the "operations of foreign ships" was simply what was mandated in the cargo preference law. Therefore, it was *Congress*, presumably taking into account the substantial international ramifications of its conduct, which adversely affected the "foreign maritime operations" at issue in *Shippers*.

laws . . .," [55] raise "the possibilities of international discord . . . and retaliative action . . .," [56] or "exert United States jurisdiction over and apply its laws to the internal management and affairs of [foreign-owned] vessels . . . ." [57] As the ILA well knows, the only entity whose conduct or policies would be significantly affected by such jurisdiction is the ILA itself.

II. The Board Is Not Deprived Of Section 8(b)(4) Jurisdiction Over A Union's Secondary Boycott By The Absence Of A Primary Labor Dispute.

The court below rightly rejected the argument that Section 8(b)(4) requires a dispute with a primary employer as a pre-condition to finding a union's secondary pressures unlawful.[58] As the Board observed in its *Allied* decision:

> Although Section 8(b)(4) is commonly described as prohibiting secondary boycotts, its prohibitions do not encompass a primary-secondary dichotomy. Rather, Section 8(b)(4) prohibits certain specified conduct if engaged in with certain specified objectives. The absence of a primary labor dispute does not preclude the invocation of Section 8(b)(4)'s protections.[59]

Although the Fourth Circuit, overturning the Board's *Ocean Shipping* decision, held that the Board may not exercise Section 8(b)(4) jurisdiction over a boycott that is "political in nature" because the existence of a labor dispute with a primary employer is an "indispensible prerequisite to jurisdiction," [60] the Board itself, and indeed

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[55] *Benz*, 353 U.S. at 143.

[56] *Id.* at 147.

[57] *McCulloch*, 372 U.S. at 20-22.

[58] 640 F.2d at 1377-78. And *see* ILA Brief at 28-29.

[59] 257 NLRB No. 151, slip op. at 11-12, fn. omitted. And *see id.* at 12-13 and cases cited therein.

[60] *N.L.R.B. v. I.L.A., supra*, 332 F.2d at 895-96. The court also found that the ILA's refusal to refer employees was not "coercive" within the meaning of Section 8(b)(4)(ii)(B), and, therefore, that the Board's order must be denied enforcement. *Id.* at 999, 997.

most courts, have rejected the Fourth Circuit's position. In fact, shortly after the Fourth Circuit's decision issued, the Board, in *National Maritime Union of America, AFL-CIO (The Weyerhaeuser Co.)*,[61] specifically refused to follow it.

Furthermore, "[o]f the five circuits that have considered the issue, only the Fourth Circuit found a primary [labor] dispute necessary to the finding of a violation of Sec. 8(b)(4) . . .,"[62] and several courts have criticized the Fourth Circuit's reasoning.[63]

Beyond the relatively straightforward error of assuming that a primary labor dispute is a prerequisite to Section 8(b)(4) jurisdiction, imprecise reasoning concerning the nature and relationship of "primary" and "secondary" conduct can cloud the analysis in equally misleading ways. For example, the pitfalls of assuming, explicitly or implicity, that there must be *some* form of "primary" activity from which secondary conduct may be distinguished are illustrated by the Fourth Circuit's conclusion in *Ocean Shipping*,[64] adopted by the district court in *Walsh*,[65] that political boycotts are protected by

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[61] 147 NLRB 1317-18, n. 3 (1964), *enforced* in *National Maritime Union v. N.L.R.B.*, 342 F.2d 538 (2nd Cir. 1965), *cert. denied*, 382 U.S. 835 (1965).

[62] 257 NLRB No. 151, slip op. at 12, fn. 15.

Contrary to the ILA's contentions, [Brief at 39-40] the Second, Eighth, and D.C. Circuits did *not* "suggest[] that the presence of a *political* dispute would protect" a secondary boycott in furtherance of such a "dispute," but merely noted that political disputes were not before them. The courts' distinctions were not, as ILA urges, "motivated" by "First Amendment considerations." Brief at 40.

[63] *See, e.g., National Maritime Union v. N.L.R.B.*, 346 F.2d 411, 415-16 (D.C. Cir. 1965); *Mountain Navigation Co., Inc. v. Seafarers International Union of North America*, 348 F. Supp. 1298, 1302-03 (W.D. Wis. 1971); and *Harrington & Company, Inc. v. I.L.A.*, 356 F. Supp. 1079, 1082-83 (S.D. Fla. 1973).

[64] 332 F.2d at 997.

[65] 488 F. Supp. at 531.

the primary conduct proviso to Section 8(b)(4)(B).[66] Congress' purpose in enacting that proviso, however, was to preserve "the right of labor organizations to bring pressure to bear on offending employers in *primary labor disputes* . . . ."[67] In the instant case, as in *Ocean Shipping*, there is no primary employer and no labor dispute with a primary employer. Accordingly, the conditions to which the proviso applies simply are not present, and, contrary to the Fourth Circuit in *Ocean Shipping* and the district court in *Walsh*, that proviso is irrelevant to an analysis of the legality of political boycotts.[68]

Similarly, when the ILA states that the First Circuit's holding on the jurisdictional issue "is a classic example of 'bifurcating' the domestic effects and the underlying dispute . . .,"[69] the Union is analogizing its "underlying foreign dispute" to the primary labor dispute at issue in *Mobile* and thus is attempting to camouflage the absence in this case of the very factor that was crucial to this Court's analysis in *Mobile* and the other foreign flag decisions.[70]

In sum, the absence of a primary labor dispute in this case not only is no barrier to the assertion of Section 8(b)(4) jurisdiction over the ILA's domestic sec-

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[66] *See* Appendix A.

[67] II Leg. History of the Labor Management Reporting and Disclosure Act 1036 (1959), quoting *N.L.R.B. v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692 (emphasis supplied). And *see* II Leg. Hist. at 1325 [remarks of Sen. Morse], 1383-84, 1708, 1720-21, 1810, 1818, 1821, and 1834.

[68] Furthermore, as the court below observed, there are substantial public policy considerations which militate against reading a political boycott exception into the Section 8(b)(4) prohibitions of secondary activity. 640 F.2d at 1378.

[69] ILA cert. pet. at 6. And *see* Brief at 15, 18.

[70] Significantly, the ILA not only has no primary labor dispute or objective *vis-a-vis* a foreign shipowner, it has no "primary dispute" of *any* kind with *any* entity. The "dispute" is between Russia and Afghanistan, and while the ILA may be displeased with Russia's actions in Afghanistan, the union certainly may not be regarded as a party to that dispute.

ondary boycott activities, it renders irrelevant both the primary conduct proviso of Section 8(b)(4)(B) and this Court's foreign flag rulings.

III. The ILA's Statements and Conduct Have Induced Employees to Engage In a Concerted Refusal to Handle Cargo Bound To or From Russia and Have Thus Coerced Neutral Persons Engaged In Commerce.

There can be no doubt that Thomas W. Gleason's January 9, 1980, statement was a "binding order from the president of the ILA to the rank-and-file membership," and that this directive emanating from the ILA leadership "induced and encouraged ILA members . . . to engage in, a refusal to handle . . ." products bound to or from Russia.[71]

This Court has held that "[t]he words 'induce or encourage' are broad enough to include in them every form of influence and persuasion."[72] Picketing or similar conduct is not a necessary element; written or oral statements are sufficient inducement or encouragement. In fact, as the Second Circuit has held, "proof of actual intent [is] unnecessary," and even a union leader's "equivocal" statement of assertedly "personal views" will be held to constitute unlawful inducement if work stoppages actually occur as a result of such statements.[73]

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[71] *I.L.A. (Allied Int'l.), supra*, 257 NLRB No. 151, slip op. at 28-29. And *see Allied Int'l., supra*, 640 F.2d at 1374 ("it is uncontroverted that the ILA leadership directed ILA members . . . to engage in a concerted refusal to handle a certain class of goods. . ."); *International Longshoremen's Association, AFL-CIO (Kansas Farm Bureau)*, NLRB-JD-99-81, slip op. at 5-6. *See* also ILA Brief at 35, n. 47 ("The ILA certainly 'encouraged' its members in the stance they had taken by backing them.")

[72] *International Brotherhood of Electrical Workers, Local 501 v. N.L.R.B.*, 341 U.S. 694, 701-702 (1951). And *see Local 732, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 229 NLRB 392, 400 (1977); *Orange County District Council of Carpenters*, 242 NLRB 587, n. 10 (1979).

[73] *N.L.R.B. v. Local Union No. 3, Int. Bro. of Elec. Wkrs., AFL-CIO*, 477 F.2d 260, 264-65 (2d Cir.), *cert. denied*, 414 U.S. 1065 (1973).

A union cannot shift responsibility for unlawful secondary conduct to the employees it represents. As the District of Columbia Circuit has held, where union policy supports a boycott, a finding of violation would not be "undermined on the ground that the secondary employees had acted individually in deciding to avoid the struck ship." [74] Similarly, the Board has held that where a union is aware of Section 8(b)(4) activities by or on behalf of employees it represents, and fails to "discourage or disclaim those activities," the union will be held "responsible for the activities found illegal." [75]

Union conduct which has a prohibited object or effect will be found unlawful even if the cessation of business relations is not complete.[76] Rather, "if the foreseeable result of secondary activity will be more than a 'slight' disruption of business relations, the 'cease doing business' requirement is met." [77]

Finally, a union engages in prohibited coercion or restraint of neutral persons when, as the ILA has done here, it refuses to refer workers.[78] Thus, contrary to

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[74] *Grain Elevator, Flour and Feed Mill Workers, International Longshoremen's Association, Local 418, AFL-CIO v. N.L.R.B.*, 376 F.2d 774, 776 (D.C. Cir. 1967).

[75] *International Longshoremen's Association, AFL-CIO, etc. (Shipside Packing Company, Inc)*, 227 NLRB 659, n. 1 (1976). But *see N.L.R.B. v. I.L.A. (Ocean Shipping)*, *supra*, 332 F.2d at 997-99 and *Walsh v. I.L.A.*, *supra*, 488 F. Supp. at 530-31, wherein the courts take the view that Section 8(b)(4) is not violated by employees' politically motivated refusals to work vessels or cargo which are subject to an ILA-ordered boycott.

[76] *See, e.g., Local 399, Int'l Brotherhood of Electrical Workers*, 235 NLRB 555, 560 (1978), citing *N.L.R.B. v. Local 825, Int'l Union of Operating Engineers, AFL-CIO* [*Burns and Roe, Inc.*], 400 U.S. 297 (1971).

[77] *N.L.R.B. v. Local 85, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, 454 F.2d 875, 878-79 (9th Cir. 1972).

[78] *International Longshoremen's Association, Inc., supra*, 257 NLRB No. 151, slip op. at 36; and *see, International Longshoremen's Association, AFL-CIO (Kansas Farm Bureau)*, NLRB JD-

the ILA's claim that it has engaged in merely a "passive protest," the evidence clearly shows that the union has, within the meaning of the Act, induced or encouraged employees to refuse to handle cargo bound to or from Russia, and has restrained or coerced neutral persons engaged in domestic and foreign commerce.

IV. The ILA's Unlawful Object Of Forcing Neutral Employers To Cease Doing Business May Be Inferred From the Reasonably Foreseeable Consequences of the Union's Secondary Boycott Conduct.

Rejecting the ILA's contention that its "sole object is to vindicate the consciences of its members . . . and, by passive action, to protest politically the invasion of Afghanistan," the court below found that "the ILA has chosen to carry out its goal of protest through action—a selective work stoppage—which by its very nature is designed to force at least partial cessation of business between companies with which ILA has no labor-related grievance." [79] Citing this Court's holding in *N.L.R.B. v. Retail Store Employees Union, Local 1001* [80] that a union is "responsible for the foreseeable consequences of its conduct," [81] the court held that "the object of a boycott, for purposes of section 8(b)(4)(ii)(B), can be inferred from the virtually inevitable results generated by it, at

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99-81 (1981), slip op. at 5. And *see Local Union No. 418, Sheet Metal Workers International Association, AFL-CIO*, 235 NLRB 144, 146 (1978); *Penello v. International Longshoremen's Association*, 227 F. Supp. 164, 169 (D. Md. 1964); *N.L.R.B. v. Local 825, International Union of Operating Engineers, AFL-CIO*, 315 F.2d 695, 697-98 (3rd Cir. 1963). Contrary to the weight of authority, the Fourth Circuit in *Ocean Shipping* held that a union's refusal for "political" reasons to refer workers to selected neutral employers does not constitute retraint or coercion of such employers within the meaning of Section 8(b)(4)(ii)(B). 332 F.2d at 996-99. Other than *Walsh*, however, no subsequent decisions have been found which follow the court's views on this issue.

[79] 640 F.2d at 1375.

[80] 447 U.S. 607, 100 S. Ct. 2372 (1980).

[81] *Id.*, 100 S. Ct. at 2377, n. 9.

least when, as here, the union's conduct can under no reading of the facts be characterized as 'primary activity' protected by the Act." [82]

Like the court below, the Board found that the ILA's conduct "is exclusively secondary. . . . Respondents attempted to pressure the USSR through those parties doing business with it—the very tactic Section 8(b)(4) was enacted to prohibit." [83] And the Board agreed that the ILA's unlawful intent may be inferred from the foreseeable consequences of the union's conduct.[84]

Contrary to ILA's contention that the First Circuit's holding constitutes an "unwarranted and dangerous . . . extension of the holding in *Retail Store Employees*," [85] the court's reasoning is fully consonant with that of a long line of Board and court decisions to the effect that "[I]n the absence of admissions by the union of an illegal intent, the nature of the acts performed shows the intent." [86] In fact, the ILA has been "on notice" since 1964 that the Board would draw such an inference, for

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[82] 640 F.2d at 1375-76 (citations and footnote omitted).

[83] *International Longshoremen's Association (Allied Int'l.)*, *supra*, 257 NLRB No. 151, slip op. at 34, fn. omitted.

[84] *Id.* at 30, 33.

[85] ILA cert. petition at 12. In contrast to the position espoused in its petition for certiorari, the ILA in its Brief to the Fifth Circuit in *Baldovin* admitted that if its boycott does not fall within the protections of the First Amendment, it violates the National Labor Relation Act's prohibition on secondary boycotts: "In the instant case, there is an either/or situation. Either respondents' actions violate § 8(b)(4) or they are free speech. No other alternative exists." *Id.* at 45.

[86] *Seafarers International Union of North America, Atlantic & Gulf District, Harbor and Waterways Division v. N.L.R.B.*, 265 F.2d 585, 591 (D.C. Cir. 1959), as quoted in *Local 761, International Union of Electrical, Radio and Machine Workers, AFL-CIO v. N.L.R.B.*, 366 U.S. 667, 674 (1961). And *see International Longshoremen's Association (Allied International)*, *supra*, 257 NLRB No. 151, slip op. at 29-36 and cases cited therein.

the Board did so when it found that the ILA's political boycott of ships used in trade with Cuba violated Section 8(b)(4).[87]

And far from being "unwarranted," the inference that the ILA intended a cessation of business is almost superfluous in light of the ILA's statements and conduct which show that from the boycott's inception, the Union's leadership recognized that making goods bound to or from Russia "hot cargo" would affect hundreds of millions of dollars in shipments of such goods.[88] In the circumstances of this case, therefore, the court below was fully justified in finding that *an* object of the ILA boycott was forcing or requiring a cessation of domestic business vis-a-vis cargo bound to or from the Soviet Union, an object prohibited by the Act.

V. Conduct Forbidden By Section 8(b)(4) Is Not Protected By the First Amendment.

The court below correctly brushed aside "ILA's argument that its concerted conduct, carried out on orders of top union management, is protected by the First Amendment."[89] There is no guarantee under the First Amend-

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[87] *Local 1355, International Longshoremen's Association (Ocean Shipping Service, Ltd.)*, 146 NLRB 723, 727, (1964).

[88] *See*, pp. 3-4, *supra*. While the ILA, in its Brief to this Court, asserts that there is not a "jot of evidence" that the ILA intended to cause a cessation of business (Brief at 25), it admits that "[t]o the extent that the domestic impact could be said to have any purpose, it was a 'crucial part of the mechanism' by which the union's foreign objective was to be achieved." Brief at 13. In other words, while the union and its members could have protested the Afghan invasion *without* involving neutrals, the ILA, despite its claims to the contrary, made a "deliberate choice . . . to engage in activity beyond what was strictly necessary. . ." to register such a protest. *See* ILA cert. petition at 12, n. 10.

[89] 640 F.2d at 1379, citing *N.L.R.B. v. Retail Store Employees Union, Local 1001, supra*, 447 U.S. 607; *International Brotherhood of Electrical Workers v. NLRB*, 341 U.S. 694 (1951); *American Radio Association v. Mobile Steamship Association*, 419 U.S. 215, 229-31 (1974); *Teamsters Union v. Vogt, Inc.*, 354 U.S. 284 (1957).

ment or the NLRA that expression, whether speech or conduct, may never be abridged. The First Amendment does not "give absolute protection to every individual to speak whenever or wherever he pleases or to use any form of address in any circumstances that he chooses." [90] Furthermore, while the First Amendment's protections do "apply to certain non-verbal conduct of communicative nature, the communication of ideas by conduct is not guaranteed the same degree of protection accorded communication by pure speech." [91]

Rejecting the argument that the First Amendment protects "all modes of 'communication of ideas by conduct,'" this Court has held that:

> [G]overnmental regulation [of conduct] is sufficiently justified if it is within the constitutional power of government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[92]

With particular regard to the secondary boycott provisions of the National Labor Relations Act, this Court long ago held in *International Brotherhood of Electrical Workers, Local 501 v. N.L.R.B.*[93] that "the prohibition of inducement of secondary pressure by § 8(b)(4)(A) carries no constitutional abridgement of free speech." [94] This

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[90] *Cohen v. California*, 403 U.S. 15, 20 (1971).

[91] *Joyce v. United States*, 454 F.2d 971, 987 (D.C. Cir. 1971), *cert. denied*, 405 U.S. 969 (1972).

[92] *United States v. O'Brien*, 391 U.S. 367, 376-77, *rehearing denied*, 393 U.S. 900 (1968). *See also, Younger v. Harris*, 401 U.S. 37, 52 (1971), and cases cited there; *A Quaker Action Group v. Morton*, 516 F.2d 717, 725-726 (D.C. Cir. 1975); *Bullock v. Mumford*, 509 F.2d 384, 387 (D.C. Cir. 1975); *U.S. v. Crosson*, 462 F.2d 96, 100 (9th Cir.), *cert. denied*, 409 U.S. 1064 (1972).

[93] 341 U.S. 694 (1951).

[94] *Id.* at 705. And note that the operative provisions of what was Section 8(b)(4)(A) when *I.B.E.W.* was decided now appear in Section 8(b)(4)(B), pursuant to the 1959 amendments.

principle has been reaffirmed consistently by the courts since *I.B.E.W.* was decided.[95]

The ILA's claim that the First Amendment protects its boycott[96] exemplifies what might be termed the "righteous brigand" theory of freedom of expression and action—that otherwise unlawful conduct motivated by "moral" considerations is insulated from legal sanctions by an unspecified amalgam of First Amendment "free speech" and "free exercise" principles. Thus, while the ILA asserts a right under the First Amendment "to engage in passive protest *as a means of expression*,"[97] the Union urges that part of the First Circuit's error resides in the court's "fail[ure] to distinguish between the right of expression, which is reflected in the publicity proviso of NLRA § 8(b)(4) itself, and the *right of conscientious refusal. . .*," *i.e.*, "the right of union members . . . to abstain from participating in what they deem an immoral endeavor" and the right of the Union to support such abstention.[98] The ILA emphasizes the pri-

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[95] *See, e.g., N.L.R.B. v. Local Union No. 3, International Brotherhood of Electrical Workers*, 477 F.2d 260, 266 (2d Cir.), *cert. denied*, 414 U.S. 1065 (1973); *National Maritime Union of America,\AFL-CIO v. N.L.R.B.*, 346 F.2d 411, 420 (D.C. Cir.), *cert. denied*, 382 U.S. 840, *rehearing denied*, 382 U.S. 933 (1965); *National Maritime Union of America, AFL-CIO v. N.L.R.B.*, 342 F.2d 598, 546 (2d Cir.), *cert. denied*, 382 U.S. 835, *rehearing denied*, 382 U.S. 933 (1965); *Brown ex rel. N.L.R.B. v. American Federation of Television and Radio Artists*, 191 F. Supp. 676 (N.D. Cal. 1961). And *see New Orleans Steamship Association v. General Longshore Workers ILA Local Union No. 1418*, 626 F.2d 445, 462-63 (5th Cir. 1980).

[96] *See* ILA cert. pet. at 12-14; ILA Brief at 33-43; and ILA Brief to the Fifth Circuit in *Baldovin v. International Longshoremen's Association, AFL-CIO* at 26-47, wherein the ILA contended that application of Section 8(b)(4) would abrogate union members' First Amendment rights by "compelling them to perform work repugnant to their political, moral, and religious beliefs."

[97] ILA cert. pet. at 12-13, emphasis supplied.

[98] *Id.* at 13-14, emphasis supplied.

Although the Union's "free exercise" defense was raised only implicitly in its petition for certiorari (cert. pet. at 13, n. 11), the ILA's Brief to this Court explicitly urges that the Court view

macy of this "right of conscientious refusal" by contending that "[s]ince this case does not involve any picketing, advertising or other publicity, the conscientious motive, rather than free expression, is paramount." [99]

Although the ILA has misread both the First Circuit's analysis [100] and the publicity proviso to Section 8(b)(4),[101] the Union is at least correct in its apparent recognition of the weakness of its claim that the boycott is a form of expression protected by the First Amendment.[102]

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the motivation of the ILA and its members in implementing this boycott as "occupy[ing] in the [lives] of its possessor[s] a place parallel to that fulfilled by . . . God. . . ." Brief at 33-34, *quoting United States v. Seeger*, 380 U.S. 163, 176 (1965).

[99] *Id.* at n. 13. Similarly, ILA maintains that "the union's action had as its object . . . governing only [ILA's] own conduct" and that the First Circuit's decision "deprived union members of any right in conscience to regulate their own behavior . . . ." *Id.* at 14.

[100] As is clear from its decision, 640 F.2d 1378-79, the First Circuit was addressing only the applicability of the primary strike or picketing proviso, and *not* the publicity proviso.

[101] Like the primary strike/picketing proviso, the publicity proviso is applicable only where there is a primary labor dispute with a primary employer. *See* Appendix A.

[102] In fact, *Schneider v. Irvington*, 308 U.S. 147 (1939), cited by the ILA in support of the proposition that "infringement of freedom of expression may not be justified on the grounds that alternative means of communication are open" [cert. pet. at 13, n. 12; Brief at 38, n. 53], is inapposite. In *Schneider*, the Court held that an ordinance which prohibited distribution of printed matter in streets and alleys but not in other public places nonetheless improperly abridged First Amendment freedom of expression, since "one is not to have the exercise of his liberty or expression in appropriate places abridged on the plea that it may be exercised in some other place." 308 U.S. at 163. The Court emphasized, however, that government may, "in the interest of the public safety, health, welfare, or convenience," properly limit the *conduct* of persons using streets or other public places without abridging the protected freedom of expression. *Id.* at 160-61. In the instant case, as the ILA concedes, "expression" is not the major issue, and, in any event, the court below did not suggest that the ILA should be prohibited from engaging in its boycott in Boston but not in some other place. On the contrary, emphasizing the strong

Prohibiting the ILA from ordering or encouraging its members to withhold their services from neutral employers would in no way abridge the freedom of the ILA or its members to express their views concerning the Russian invasion of Afghanistan. Secondary boycott conduct is unlawful, and the inducement of such conduct by oral or written statements is likewise unlawful. Application of Section 8(b)(4)(i) and (ii)(B) to the ILA's statements and conduct would not, therefore, constitute a content-based regulation of expression,[103] but rather a straightforward prohibition of illegal activity and the inducement or encouragement thereof.

The ILA's argument that its conduct is protected by the Free Exercise Clause must also fail. As this Court emphasized in *Gillette v. United States*,[104] "[o]ur cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government."[105] The ILA's assertedly conscientious abstention from handling Soviet cargo collides head on with its obligation to refrain from engaging in secondary boycotts.

Moreover, even if a factual setting could be conceived wherein application of Section 8(b)(4) to a union's otherwise unlawful secondary boycott would impede unjustifiably some individuals' religious beliefs, that factual setting is not before this Court. First, "[o]nly beliefs rooted in religion are protected by the Free Exercise

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public policy objectives supporting Section 8(b)(4), 640 F.2d at 1377-78, the court stressed that prohibiting the union's "coercive tactics against neutral parties" would *not* "rob either the ILA or its members of their 'right of expression.'" *Id.* at 1378-79.

[103] *See N.L.R.B. v. Retail Store Employees Union, Local 1001*, 447 U.S. 607, 100 S.Ct. 2372, 2378-79 (1980), concurrences of Justices Blackman and Stevens; *Carey v. Brown*, —— U.S. ——, 100 S.Ct. 2286, 2295-96 (1980); *Police Department of Chicago v. Mosley*, 408 U.S. 92 (1972).

[104] 401 U.S. 437, *rehearing denied*, 402 U.S. 934 (1971).

[105] 401 U.S. at 461, and *see* cases cited there.

Clause. . . ." [106] Philosophical and personal beliefs of standards of conduct are not "religious" for purposes of the Religion Clauses.[107] Furthermore, to establish that a statute or other governmental act offends the Free Exercise Clause, "it is necessary . . . for one to show the coercive effect of the enactment as it operates against him in the practice of his religion." [108] Unless he can make such a showing, an individual has no standing to claim that a statute abrogates his Free Exercise Clause rights.

Here, although the ILA has alluded vaguely to the "religious" underpinnings of the boycott,[109] the credibility of such allusions is undercut by the Union's assertions elsewhere that "the [ILA's] action is, whatever its practicality, *solely political*," [110] and by the absence of any reference to religious considerations in ILA President Glea-

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[106] *Thomas v. Review Board of Indiana Employment Security Division*, —— U.S. ——, 101 S.Ct. 1425, 1430 (1981), citing *Sherbert v. Verner*, 374 U.S. 398 (1963), *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1971).

[107] *Wisconsin v. Yoder*, 406 U.S. at 215-216.

ILA's citation (Brief at 33-34) of the conscientious objector cases [*Gillette v. United States*, 401 U.S. 437 (1970); *Welsh v. United States*, 398 U.S. 333 (1970); and *United States v. Seeger*, 380 U.S. 163 (1965)] is clearly inappropriate since those cases involved this Court's interpretation of a statutory exemption for religious objectors to participation in war, Section 6(j) of the Military Selective Service Act, 50 U.S.C. App. § 456(j). As stated in *Seeger*, this Court's construction of the terms "religious" and "Supreme Being" pertained "solely . . . to the language of Section 6(j) and not otherwise." 380 U.S. at 174. There is, of course, *no* "religious" or "conscientious" exemption to Section 8(b)(4)'s prohibition of secondary activity.

[108] *Abington Township School District v. Schempp*, 374 U.S. 203, 223 (1963), as quoted in *Board of Education of Central School District No. 1 v. Allen*, 392 U.S. 236, 248-49 (1968).

[109] *See* n. 98 above.

[110] ILA Brief to Fifth Circuit at 16, emphasis added. And *see id.* at 14 ("the ILA's activities . . . are grounded in a solely political protest designed to elicit a political, if any, reaction.")

son's statement ordering the boycott's commencement.[111] Similarly, no evidence has been introduced showing that *any* individual longshoreman or ILA officer has been or would be coerced in the exercise of his religion by the application of Section 8(b)(4). On the contrary, given the ILA's willingness to abandon its boycott when ordered to do so by an arbitrator or a court enforcing a labor contract's no-strike provision, or more significantly, when the Union's support for the policies of a new President and its sense of "fairness and evenhandedness towards all American business" [112] outweigh the demands of conscience,[113] the ILA's plea for Free Exercise Clause protection seems particularly specious.

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[111] *See* n. 5 above.

[112] *See* the news release issued on June 8, 1981 by the office of ILA President Thomas W. Gleason, Appendix C.

[113] *See* Brief at 34-35, and especially n. 46 wherein the ILA suggests that handling cargo bound to or from Russia might constitute treason.

CONCLUSION

Contrary to the expressed request of the then-President of the United States, the ILA has attempted to influence the foreign policy of another nation by engaging in an unlawful secondary boycott in this country. As ILA President Gleason predicted, the boycott had a tremendous impact upon neutral domestic employers in the chain of this Nation's commerce with the Soviet Union. The statute requires, and neither the First Amendment nor any decision of this Court precludes, the application of Section 8(b)(4)(i) and (ii)(B) to the ILA's conduct. Accordingly, the amicus curiae American Farm Bureau Federation respectfully urges that this Court affirm the holding of the court below and make it clear that there is no political protest exception to the statutory prohibition of secondary boycotts.

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APPENDICES

APPENDIX A

Section 8(b)(4)(i) and (ii)(B) makes it an unfair labor practice for a labor organization:

> to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is: . . . (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 9: *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing; . . . *Provided further*, That for the purposes of this paragraph (4) only, nothing contained in such paragraph shall be construed to prohibit publicity, other than picketing, for the purpose of truthfully advising the public, including consumers and members of a labor organization, that a product or products are produced by an employer with whom the labor organization has a primary dispute and are distributed by another employer, as long as such publicity does not have an effect of inducing any individual employed by any person other than the primary employer in the course of his employment to refuse to pick up, deliver, or transport any goods, or not to perform any services, at the establishment of the employer engaged in such distribution.

APPENDIX B

Section 303 provides that:

(a) It shall be unlawful, for the purpose of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity defined as an unfair labor practice in section 8(b)(4) of the National Labor Relations Act, as amended.

(b) whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefor in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

APPENDIX C

The text of the news release issued on June 3, 1981 by the office of ILA President Thomas W. Gleason is as follows:

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION URGES MEMBERS TO REMOVE BOYCOTT ON ALL OCEAN TRADE WITH SOVIET UNION

Thomas W. Gleason, President of the International Longshoremen's Association today announced that the 100,000 members of the union have been urged by the leadership to handle all ocean trade between the United States and the Soviet Union in normal manner effective immediately.

He noted that ILA on April 24, 1981 recommended that the membership resume handling grains, phosphate rock and fertilizer material bound for the Soviet Union in keeping with a trade policy decision of the Reagan administration. This marked the first voluntary break in the union boycott against Russian cargoes that was imposed on January 9, 1980.

Mr. Gleason said the union leadership now feels that ILA longshoremen should handle all commodities in ocean commerce between the two countries with no restrictions as a matter of equity to all parties.

He said that producers, manufacturers and importers of products which were never embargoed by United States government policy should be given handling treatment by ILA similar to that for grains, phosphate rock and fertilizer material.

"In the interests of fairness and evenhandedness towards all American business and in further support of President Reagan's present trade policy, the

ILA recommends to its members that they now discontinue their refusal to handle goods bound to and from the Soviet Union," Mr. Gleason said.

The ILA is the nation's largest waterfront union and it represents dockworkers in ports from Maine to Texas as well as the Great Lakes, Puerto Rico, and Canada.

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No. 80-1663

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, *et al.*,
Petitioners,

v.

ALLIED INTERNATIONAL, INC.,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

---

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

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BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations, a federation of 102 national and international unions with a total membership of approximately 14,500,000 working men and women, files this brief *amicus curiae* in support of the position of the petitioners, with the consent of the parties as provided for in the Rules of this Court.

ARGUMENT

The First Circuit's decision in this case conflicts with a succession of decisions of this Court—including *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138 (1957); *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10 (1963); *Incres S.S. Co.* v. *Maritime Workers*, 372 U.S. 24 (1963); *Windward Shipping* v. *American Radio Assn.*, 415 U.S. 104 (1974) (*Windward*), *and American Radio Assn.* v. *Mobile S.S. Assn.*, 419 U.S. 215 (1974) (*Mobile*)—holding that the National Labor Relations Act, 29 U.S.C. § 151, *et seq.* ("the Act") does not reach union activity arising from a foreign dispute when such activity might substantially intrude into the field of international relations. In order to affirm the decision below, this Court must overrule its prior decisions; in order to adhere to its earlier decisions, the Court must reverse the First Circuit's decision. The one result that would be contrary to both precedent and principle would be to decide that the union always loses in such cases—to affirm the decision below without overruling the *Benz-Mobile* line of cases. The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) participated as *amicus curiae* in *Sociedad Nacional*, *Windward*, and *Mobile*. In each instance, this *amicus* has urged that the Act be read to reach the dispute in accordance with the terms of the Act and the unquestioned scope of Congress' constitutional authority. Absent countervailing considerations, therefore, this *amicus* would support the interment of this line of cases and not urge reversal, on jurisdictional grounds, of the First Circuit's decision in this case. Because none of the parties, however, is urging that these precedents be overruled, we shall confine our discussion to showing that, on the present state of the law, the judgment below may not stand.

The controversy in this case arose from the Union's disapproval of the Soviet invasion of Afghanistan. That disapproval was manifested by a refusal to unload cargo originating in the Soviet Union. It is beyond question,

first, that the basic dispute—whether viewed as the Union's disapprobation of Soviet aggression, or the Soviet-Afghanistan conflict itself—prompting the Union's action was a matter well outside "commerce" within the meaning of the Act and, second, that the Union's response had potential international ramifications of substantial magnitude. In these circumstances, this Court's decisions in *Windward* and *Mobile* unequivocally establish that the Act does not reach the Union's conduct, even insofar as that conduct affected domestic employers.

1. *Windward* involved picketing by American maritime unions directed against foreign ships owned by foreign corporations and manned by foreign nationals, who were represented by foreign unions. The unions' activity called attention to the competitive difference between foreign and domestic seamen's wages, and to the resulting impact on American job opportunities and wage standards. Longshoremen and other port workers honored the picket lines and declined to load and unload the picketed ships. In holding that the Act did not regulate the unions' conduct, and thus did not preempt an action brought under state law in state court by the foreign shipowners, this Court set out the principles that govern this case.

As a preliminary matter, this Court observed that Congress had expressed no "affirmative intention" that the Act should be invoked "to run interference in [the] delicate field of international relations . . . where the possibilities of international discord are so evident and retaliative action so certain." 415 U.S., at 110-111 (quoting *Benz* v. *Compania Naviera Hidalgo*, 353 U.S., at 147). In this field, the "term 'in commerce,' as used in the LMRA" must not be "literally" applied, lest the Act reach activities significantly affecting international trade and foreign relations. 415 U.S., at 112-113. See also *McCulloch* v. *Sociedad Nacional, supra.*

In determining that the union activity in *Windward* was not "in commerce," within the meaning of the Act, the Court looked to the basis of the underlying dispute

and to the possible international ramifications of the unions' activity to ascertain whether that activity substantially intruded, or threatened to intrude, into international maritime trade so as to exceed the reach of the Act. With respect to the character of the underlying dispute, the Court observed that the unions' activity "protested the wages paid to foreign seamen who were employed by foreign shipowners under contracts made outside the United States." *Id.*, at 114. The dispute thus concerned matters taking place outside this Country, directly involving foreign nationals, unlike a "dispute center[ing] on the wages to be paid American residents [by owners of foreign ships]," which previously had been held covered by the Act. *Id.*, at 112; see *Longshoremen* v. *Ariadne Co.*, 397 U.S. 195 (1970).

With respect to the potential international consequences of the union activity, the Court explained that the unions' underlying concerns regarding the competitive advantage of foreign vessels could not be accommodated by some adjustment to wages paid to American workers, but only by a large-scale increase in operating costs incurred by foreign ships, which "would have more than a negligible impact" on the maritime operations of these vessels. The Court elaborated, 415 U.S., at 114-115:

> A decision by the foreign owners to raise foreign seamen's wages to a level mollifying the American pickets would have the most significant and far-reaching effect on the maritime operations of these ships throughout the world. A decision to boycott American ports in order to avoid the difficulties induced by the picketing would be detrimental not only to the private balance sheets of the foreign shipowners but to the citizenry of a country as dependent on goods carried in foreign bottoms as is ours. Retaliatory action against American vessels in foreign ports might likewise be considered, but the employment of such tactics would probably exacerbate and broaden the present dispute. Virtually none of the predict-

> able responses of a foreign shipowner to picketing of this type, therefore, would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate.

The Court thus concluded that the labor activity in question was beyond the scope of the Act because the issue giving rise to that activity—the payment by foreign shipowners of substandard wages to foreign seamen—was not limited to essentially domestic labor relations, and because the union activity had significant potential repercussions for international trade and international relations.

2. In *Mobile*—which involved the same maritime unions that were parties in *Windward*, the same kind of union activity, the same underlying dispute, and the same resulting refusal by stevedore workers to cross the unions' picket lines—this Court confirmed that the Act left unregulated not only the controversy between the unions and the foreign shipowners against whom the union activity was directed, but also the related interference with the businesses of American employers. The litigation in *Mobile* was commenced in state court by domestic stevedoring companies that sought to service the picketed foreign ship and by a domestic shipper who wished to have his crops loaded on it. The gravamen of the state court complaint was that the unions had induced employees of the neutral domestic plaintiffs to cease performing work, and thus had wrongfully interfered with the plaintiffs' pursuit of their lawful business activities. Because the elements of the state claim essentially coincided with the elements of a claim under the secondary boycott provision of the Act, § 8(b)(4), 29 U.S.C. § 158(b)(4), the question arose whether that section arguably prohibited the unions' activities, and accordingly preempted the state court proceedings.

In approaching this question, the Court emphasized the necessity of confronting the threshold issue whether the

jurisdictional requirements of the Act had been met, 419 U.S., at 221:

> Even if there is a dispute between [the unions] and [the domestic employers] which is, in some semantic sense, independent of [the unions'] dispute with foreign-flag ships, that dispute is subject to state-court disposition unless it satisfies the jurisdictional requirements of the NLRA.

A "necessary predicate for a finding . . . of an unfair labor practice under § 8(b)(4)," the Court explained, was that the challenged labor activities be activities affecting "commerce." *Ibid.*

This Court refused to read *Windward* as standing for "nothing more than . . . that the *maritime operations of foreign ships* are not 'in commerce.'" *Ibid.* (Emphasis supplied.) The inquiry in *Windward* was directed at determining whether "the *activities . . . complained of*" were in "commerce" within the meaning of the Act. *Ibid.* (Emphasis supplied.) In *Windward*, the Court had examined the nature of the underlying dispute and the potential international ramifications of the unions' activities, as discussed above, and had determined that Congress did not intend to reach those activities through the federal labor laws. The fact that the unions' actions affected domestic employers—indeed, the fact that cessation of work by American stevedores and interference with the business of American exporters "was a crucial part of the mechanism by which the maritime operations of the foreign ships were to be affected," *id.*, at 224—did not alter the character of the primary dispute or lessen the potential implications of the labor activity for international trade or foreign relations, which together served to remove the activity from the coverage of the Act. Thus, in *Mobile*, this Court held that "[t]he fact that the jurisdiction of the state courts in this case is invoked by stevedores and shippers does not convert into 'commerce' activities which plainly were not such in

Windward." *Id.*, at 225. The Court declined to subscribe to "a bifurcated view of the effects of a single group of pickets at a single site," *id.*, at 222, and rejected "the proposition that a secondary employer's *domestic business activities* may be the basis for Board jurisdiction where the *primary dispute* is beyond the *statutory* authority over unfair labor practices 'affecting commerce,'" *id.*, at 226 (emphasis supplied in part).

3. This Court's decisions in *Windward* and *Mobile* control the resolution of the instant case. These decisions teach that a prerequisite to determining whether union activities violate § 8(b)(4) of the Act is that those activities affect "commerce" in the limited sense used in the Act. Whether union activities affect "commerce" within the meaning of the Act is in turn determined by the character of the basic or primary dispute giving rise to those activities and the implications of those activities for foreign trade and international relations. If the primary dispute is not limited to a controversy over the terms and conditions of employment of American workers and if union activities have potential international implications beyond "the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate," *Windward, supra*, at 115, then those activities are for all purposes outside the scope of the Act.

The basic dispute giving rise to the Union activity at issue in this case involved Soviet aggression abroad—a matter completely unrelated to employment conditions of American workers. Union protest took the form of a suspension in the handling of all Russian ships and all cargo bound for or arriving from the Soviet Union. The impact of that action chronicled just in this case involved interference with the importation of Russian wood products (purchased under contract with two Soviet agencies) via shipment by an American company (arranged through a third Soviet agency), resulting in a cutback in trade with the Soviet Union. *Allied International* v. *ILA*,

640 F.2d 1368, 1369-1370, 1375 n. 5 (CA1 1981). The Union's activity thus intruded significantly into the area of world trade and posed delicate issues of foreign diplomacy and international relations. The Union's concerns, moreover, could not be accommodated by some "sort of wage-cost decision benefiting American workingmen," but only by major foreign policy action by the Soviet government. This Court's decisions in *Windward* and *Mobile* make clear that "Congress did not intend to strain through the filament of the NLRA," 419 U.S., at 228, labor activity such as this.

It follows under *Mobile* that the Act leaves unregulated not only the effect of the Union's actions on Soviet trade agencies or on the Soviet government in general, but the effect on the business activities of domestic shippers, stevedores, and importers as well. As the Court held in *Mobile*, it will not permit "a bifurcated view of the effects" of a single labor action. *Id.*, at 222. A "secondary employer's domestic business activities may [not] be the basis for [jurisdiction under the Act] where the primary dispute is beyond [the] *statutory* authority over unfair labor practices 'affecting commerce.'" *Id.*, at 226. The Union activity at issue in this case thus did not affect "commerce" within the meaning of the Act; it follows that the plaintiff has failed to establish a necessary predicate for finding a violation under § 8(b)(4) of the Act, and in turn for sustaining a claim under § 303 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 187.

4. The First Circuit in this case acknowledged that the Union activity in issue "was inspired by military events in foreign lands—events far beyond NLRB jurisdiction," 640 F.2d, at 1374, but held that this fact did "not counsel against application of the NLRA to the labor dispute ongoing here at home," *ibid.* The First Circuit read *Mobile* "as establishing that in the case of interrelated *labor* disputes, particularly disputes that give rise to similar conduct carried out at a single site,

a 'primary dispute' cannot be extricated from a 'secondary dispute' for purposes of contrary jurisdictional findings." *Ibid.* (Emphasis supplied.) In this case, the First Circuit contended, because the "*only* labor-related activity in issue has been played out by an all-American cast," there "is no attempt to 'bifurcate' the effects of a single union action." *Ibid.* (Emphasis in original.)

The First Circuit's conclusion is based on a fundamental misapprehension of this Court's decision in *Mobile*. The thrust of *Mobile*, and of the decisions before it, is that the focus of the Act is on union activity arising from a *domestic* labor dispute, and that the Act should not be construed to reach activity that threatens to intrude into the "delicate field of international relations." A foreign controversy is no more a domestic labor matter and no more in "commerce" if it does not involve foreign labor affairs but concerns, instead, core issues of international political relations. If anything, union activity growing out of such a controversy and having potential implications for that controversy would seem more clearly outside "commerce" and the coverage of the federal labor relations laws, under this Court's reasoning in *Windward* and *Mobile*, than union activity prompted by working conditions of foreign seamen. As the Fifth Circuit held when confronted with essentially this same issue:

> If the fact that the present dispute is with a foreign government over military policy makes the activity in commerce, while a dispute with a foreign employer over its labor policy would not be in commerce, then the anomalous result would be that [relief under the Act] could not issue when labor relations are involved but could issue when they are not. . . . When the dispute is over a foreign government's invasion of a remote nation, it is more emphatically not "in commerce."

Baldovin v. *ILA*, 626 F.2d 445, 453 (CA5 1980). The First Circuit's attempt to distinguish *Mobile* on the

ground that foreign employment is not involved in this case must accordingly fail. *Mobile* compels the conclusion that the Union's activity is outside "commerce" and the scope of the Act. There is no basis, therefore, for scrutinizing that activity under § 8(b)(4) of the Act, or for entertaining respondent's § 303 claim predicated on a violation of § 8(b)(4).

CONCLUSION

For the foregoing reasons, the decision of the Court below should be reversed.

Respectfully submitted,

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF *AMICUS CURIAE* OF OCCIDENTAL CHEMICAL COMPANY IN SUPPORT OF RESPONDENT

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BRIEF *AMICUS CURIAE* OF OCCIDENTAL CHEMICAL COMPANY IN SUPPORT OF RESPONDENT

INTEREST OF THE AMICUS CURIAE *

Occidental Chemical Company (hereinafter "Occidental") is a Delaware Corporation that is engaged, *inter alia*, in the business of importing potash, urea and ammonia from the Union of Soviet Socialist Republics pursuant to a long-term bilateral trade agreement. Occidental regularly receives import shipments of these commodities at various ports on the East and Gulf coasts of the United States, including Savannah and Port of Brunswick, Georgia. Occidental retains various companies to perform the stevedoring work necessary to transfer these cargoes from ocean-going vessels. These

* This brief is filed with the written consent of all parties, pursuant to Supreme Court Rule 36.

companies, in turn, have agreements with union locals affiliated with the International Longshoremen's Association, AFL-CIO (hereinafter "the ILA"), one of the Petitioners herein, by which the locals have contracted to supply workers to assist in the stevedoring operations.

After ILA President Gleason issued his January 9, 1980 directive ordering ILA locals not to handle cargoes destined to or originating in the Soviet Union,[1] ILA Locals 1414 and 1423 refused to supply Occidental's stevedoring companies with the workers needed to assist in the unloading of various ocean-going vessels. Occidental filed unfair labor practice charges on February 19, 1980, alleging violations of Section 8(b)(4)(i) and (ii)(B) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(b)(4)(i) and (ii)(B) (hereinafter "the NLRA" or "the Act").

Subsequently, a hearing in this matter was held on September 4 and 5, 1980, in Savannah, Georgia, before Administrative Law Judge Bernard Ries.[2] Occidental's case was consolidated, for purposes of briefing only, with cases in which other concerns affected by the ILA's boycott, including Allied International, Inc., Respondent herein, and the American Farm Bureau Federation, were the charging parties. The administrative law judge issued separate decisions on March 16, 1981 dismissing the complaints of all charging parties on the grounds that the disputes were not "in commerce" and, therefore, were beyond the jurisdiction of the National Labor Relations Board (hereinafter "the Board"). On August 28,

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[1] The directive is set out in full at footnote 2 in the opinion of the court below, *Allied International, Inc. v. ILA*, 640 F.2d 1368, 1369-70 (1st Cir. 1981), 3a.

[2] Prior to this hearing, on March 4, 1980, the United States District Court for the Southern District of Georgia issued an Order granting a preliminary injunction under Section 10(l) of the Act, 29 U.S.C. § 160(l). On September 25, 1980, the United States Court of Appeals for the Fifth Circuit reversed the district court's award of Section 10(l) relief. *Baldovin v. ILA*, 626 F.2d 445 (5th Cir. 1980).

1981, the Board, in the case brought by Allied International, 1-CC-1753, reversed Judge Ries' decision, finding that it had "jurisdiction over the allegedly unlawful secondary effects of a primary dispute between an American union and a foreign nation." *International Longshoremen's Association, (Allied International)*, 257 N.L.R.B. No. 151 (August 28, 1981), slip op. at 1. Occidental's appeal has yet to be decided by the Board.

Accordingly, Occidental has a substantial interest in the outcome of the instant case, in that this Court's decision will determine whether Occidental, and the stevedoring companies with which it does business, will be able to avail themselves of the protections offered by the NLRA against secondary boycotts.

SUMMARY OF ARGUMENT

As the First Circuit and the Board have correctly determined, the ILA, through its boycott of goods originating in or destined for the Soviet Union, has "engaged in conduct classically subject to and violative of Section 8(b)(4) of the National Labor Relations Act." *Allied International*, 257 N.L.R.B. No. 151, slip op. at 1. The ILA directed its members to refuse to perform longshoring services for various American companies, hoping thereby to disrupt existing business relations among American companies and eliminate trade between certain of these companies and the Soviet Union. That the ILA's boycott was politically motivated does not allow it to escape the express prohibitions of Section 8(b)(4), which in no way distinguishes between economically and politically inspired boycotts. Indeed, as the First Circuit observed, it is more rather than less objectionable that the ILA has used its statutorily derived powers in aid of objectives extraneous to legitimate trade union concerns. *Allied International v. ILA*, 640 F.2d 1368, 1378 (1st Cir. 1981), 21a.

The ILA erroneously asserts that its boycott was not "in commerce" within the meaning of the Act. This contention is based upon an incorrect reading of this Court's

decisions in a series of cases, including *Windward Shipping (London) Ltd. v. American Radio Association*, 415 U.S. 104 (1974), in which the Court held that the Act did not apply to labor disputes directed at the use and operation of foreign-flag ships when the application of the Act to such disputes threatened to interfere or conflict with foreign labor or maritime laws or policies.

The rationale of the foreign-flag ship cases plainly indicates that these cases do not preclude application of the NLRA to the ILA's boycott. As this Court stated in *Windward*, the Court's decisions in these cases were all based on the principle "that Congress when it used the words 'in commerce' [in the NLRA], simply did not intend that Act to erase longstanding principles of comity and accommodation in international maritime trade." 415 U.S. at 112-13. Because the ILA's boycott was not directed at the use or operation of foreign flag ships, but was instead designed to disrupt existing trade with the Soviet Union, regardless of how the commodities in question were transported, neither the shipboard labor relations of the boycotted vessels nor international maritime laws or policies were in any way affected by the boycott. Accordingly, no identifiable comity interest would be served by construing the NLRA so that it would not apply to the ILA's boycott.

Nor would application of Section 8(b)(4) of the Act to the ILA's conduct violate the free speech guarantees of the first amendment. Even if the ILA's boycott can be characterized as a form of political expression, this Court has held repeatedly that disruptive conduct which incidentally serves to express a political message is not immune from reasonable government regulation.

ARGUMENT

I. THE FIRST CIRCUIT CORRECTLY HELD THAT THE ILA'S BOYCOTT VIOLATED SECTION 8(b)(4) OF THE NATIONAL LABOR RELATIONS ACT

Both the First Circuit and the Board were correct in concluding that the ILA has "engaged in conduct clas-

sically subject to and violative of Section 8(b)(4) of the National Labor Relations Act." *Allied International*, slip op. at 1. By exhortation and by direct command the ILA induced and encouraged its members to engage in strikes and to refuse to perform services in the course of their employment within the meaning of Section 8(b)(4)(i). Moreover, by publicly proclaiming its strike intent and by refusing to furnish longshoremen to neutral parties, such as the various stevedoring companies used by Occidental, the ILA threatened, coerced and restrained persons engaged in commerce within the meaning of Section 8(b)(4)(ii). Finally, because the ILA took these measures, at least in part, to disrupt business relations between neutral stevedoring companies and other companies such as Allied and Occidental, and thereby further its goal of eliminating trade with the Soviet Union, the ILA's actions had an object within the ban of Section 8(b)(4)(i)(ii)(B), *viz.*, the forcing of one person to cease doing business with another.

It is not disputed that the ILA's boycott was motivated by the Soviet Union's invasion of Afghanistan. Nonetheless, the legal issues presented by the ILA's boycott are more clearly understood if the various importers, such as Allied and Occidental, are considered to be primary employers.[3] The boycott could not, and was never intended to, exert sufficient economic pressure on the

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[3] The First Circuit's alternative reasoning to the effect that the primary dispute in these cases was between the ILA and the Soviet Union also leads to the correct conclusion that the NLRA is applicable to the ILA boycott. 640 F.2d at 1372, 9a. Occidental's analysis, maintained throughout all of the ILA boycott litigation in which it has been involved, is preferable in that it sets the instant dispute in more conventional Section 8(b)(4) terms, thereby clearly demonstrating that the ILA's conduct was "tactically calculated to achieve union objectives elsewhere." *National Woodwork Manufacturer's Association v. NLRB*, 386 U.S. 612, 644-45 (1967). This theory also more clearly exposes the speciousness of the ILA's contention that the instant dispute is not "in commerce" within the meaning of the Act. *See* pp. 9-22, *infra*.

Soviet Union to prompt its withdrawal from Afghanistan. In reality, the primary objective of the ILA's work stoppage was to force Occidental, and others trading with the Russians, to forego that business. The primary objective of the ILA's work stoppage would have been accomplished as soon as Occidental and other American companies lawfully dealing with the Soviets acceded to the secondary pressures the ILA exerted against neutral stevedoring companies with which it has collective bargaining agreements. Thus, it is not true that this case involves only the ILA's dispute with Soviet policies in Afghanistan; indeed, the entire boycott has been directed at American companies trading in Russian products.[4] As the lower court correctly observed, this boycott has an "all American cast." 640 F.2d at 1374, 13a.

The political motivation of the ILA's boycott makes it no less a violation of Section 8(b)(4). The Board and almost every court that has passed on this issue have decided that the existence of a primary labor dispute is not a prerequisite for "the invocation of Section 8(b)(4)'s protections." *Allied International*, slip op. at 11. *Accord, Soft Drink Workers Local 812, IBT v. NLRB*, 105 L.R.R.M. 2658 (D.C. Cir. 1980); *NLRB v. Twin City Carpenters District Council*, 422 F.2d 309 (8th Cir. 1970); *National Maritime Union v. NLRB*, 346 F.2d 411 (D.C. Cir.), *cert. denied* 382 U.S. 840 (1965); *National Maritime Union v. NLRB*, 342 F.2d 538 (2d Cir.), *cert. denied*, 382 U.S. 835 (1965); *NLRB v. Washington-Oregon Shingle Weavers District Council*, 211 F.2d 149 (9th Cir. 1954). *But cf. NLRB v. ILA (Ocean Shipping)*, 332 F.2d 992 (4th Cir. 1964). These decisions recognize that the harm suffered by neutral employers

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[4] The form of this boycott and the absence of picketing or other conduct aimed directly at the Soviet Union confirms that the boycott's primary objective was to force Occidental and similarly situated companies to cease dealing with the Soviet Union.

is no less serious simply because a boycott is not the result of a primary labor dispute. Indeed, as the First Circuit observed below, the fact that the ILA's boycott was politically motivated all the more clearly condemns it as activity proscribed by Section 8(b)(4):

> We think it more rather than less objectionable that a national labor union has chosen to marshal against neutral parties the considerable powers derived by its locals and itself under the federal labor laws in aid of a random political objective far removed from what has traditionally been thought to be the realm of legitimate union activity.

640 F.2d at 1378, 21a. In short, the gravamen of the prohibition against secondary boycotts is the involvement of neutral parties in "controversies not their own," irrespective of the reason for the union's illegal secondary pressure. *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951).

This conclusion is compelled by the express language of the relevant statutory prohibitions themselves, buttressed by the legislative history. Section 2 of the Act, 29 U.S.C. § 152, specifically defines the term "labor dispute." Although this term is used in other provisions of the Act, it is nowhere employed in Section 8(b)(4). *Cf.* 29 U.S.C. § 160(a). It is a well recognized rule of statutory construction that when Congress has carefully employed a term in one section of a statute and has excluded it in another, the courts "cannot supply what Congress has studiously omitted." *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959). Section 8(b)(4) is broadly worded to cover any attempt to threaten, coerce, or restrain employers or to induce or encourage employees to engage in certain conduct for the purpose of "forcing any person . . . to cease doing business with any other person."

Had Congress intended to limit the prohibition against secondary boycotts to situations involving a traditional labor dispute, that result could easily have been achieved.

Congress did not intend to do so, and there is no indication in the legislative history that such a narrow construction of the Act's secondary boycott provisions was contemplated. To the contrary, the legislative history of Section 8(b)(4) establishes that Congress designed these provisions to prohibit every type of activity that falls within the literal language of Section 8(b)(4). As Senator Taft, the bill's sponsor stated:

> It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts.

93 Cong. Rec. 4323 (1947), *reprinted in* II NLRB LEGISLATIVE HISTORY OF THE LABOR MANAGEMENT RELATIONS ACT, 1947, at 1106 (1948).

The ILA's claim that the motive for its boycott precludes the application of Section 8(b)(4) is thus without merit. This Court has made it clear that one must look beyond a union's explanation of its motivation and examine the totality of the conduct complained of to determine whether the objective claimed by the union is the sole motive of the union's conduct, or whether the conduct has some other object that is proscribed by Section 8(b)(4). *NLRB v. Pipefitters Local 638*, 429 U.S. 507, 511 (1977). Claiming a political motive for illegal secondary conduct is no different from asserting the preservation of existing work as a legitimate objective of the secondary conduct; neither claim should be taken at face value.[5]

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[5] It would be the rare union indeed that would not defend a secondary boycott charge by asserting *some* legitimate reason for its conduct. In other "mixed motive" cases, the Board has routinely rejected such claims where the totality of the union's conduct shows an objective within the ban of Section 8(b)(4). *See e.g., Local 441, IBEW*, 208 N.L.R.B. 943 (1974) (asserted area standards picketing); *Glaziers Local 513*, 158 N.L.R.B. 1621 (1966) (informational picketing); *IBEW Local No. 11*, 154 N.L.R.B. 766 (1965) (area standards picketing); *United Wholesale & Warehouse Employees, Local 261*, 125 N.L.R.B. 520, 524 (1959) (consumer information

Petitioners assert no cogent reason why the ILA boycott does not violate Section 8(b)(4) of the Act.[6] Accordingly, the First Circuit's well-reasoned decision ends the discussion, absent some particular reason why the protection of the Act should be denied in this case.

II. THE ILA'S BOYCOTT IS "IN COMMERCE" WITHIN THE MEANING OF THE ACT

The critical question in this case is whether the ILA's conduct, despite being the type of activity that is clearly proscribed by Section 8(b)(4), is sufficiently related to commerce to come within the prohibitions of the Act. The ILA acknowledges that its conduct was directed at a number of American companies, including Occidental and the various stevedoring companies employed by Occidental, which were engaged in activities "in" and "affecting commerce" within the literal wording of the Act.[7]

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picketing). *Accord, Soft Drink Workers Local 812, IBT v. NLRB*, 105 L.R.R.M. 2658 (D.C. Cir. 1980) (work preservation picketing). *See also NLRB v. Retail Store Employees Local 1001*, 447 U.S. 607 (1980).

[6] The ILA's claim that there is no evidence of a proscribed object, Brief for Petitioners at 24, ignores both this Court's precedent and common sense. It is well-settled that Section 8(b)(4) is violated if *an* object of the union's conduct is unlawful, *NLRB v. Denver Building & Construction Trades Council*, 341 U.S. at 689, and that the statute proscribes union secondary pressure even if something less than a complete cessation of business results. *NLRB v. Local 825, International Union of Operating Engineers (Burns & Roe)*, 400 U.S. 297, 304-305 (1971). Common sense leaves no doubt that *an object* of the boycott was to force the neutral stevedores to stop doing business with companies like Allied and Occidental, in order to force them to stop doing business with the Soviets. It is far too late in the day for the ILA to contend that it should not be held to the natural and forseeable consequences of its actions. *Local 761, International Union of Electrical Radio & Machine Workers v. NLRB*, 366 U.S. 667, 674 (1961).

[7] Both the disruption of commerce and interference with American foreign policy caused by the ILA boycott are well documented. Comment, *Protest Boycotts and Federal Labor Laws: The Russian*

Nonetheless, the ILA, relying principally on this Court's decisions in *Windward* and the related case of *American Radio Association v. Mobile Steamship Association*, 419 U.S. 215 (1974), contends that, because its boycott was ultimately motivated by its disapproval of the foreign policy of the Soviet Union, the secondary boycott provisions of the Act do not reach its conduct. This contention is premised on a misunderstanding of the rationale of the Supreme Court's decisions in *Windward* and *Mobile*.[8]

Mobile and *Windward* were but the most recent in a line of cases beginning with *Benz v. Compania Naviera Hidalgo*, 353 U.S. 138 (1957), in which the Court grappled with the legal implications of various attempts by American unions in differing circumstances to impact the "maritime operation of . . . foreign ships." *Wind-*

Trade Boycott Litigation, 3 NW. J. INT'L L. & BUS. 211 (1981). The ILA's historical penchant for engaging in this kind of conduct thus makes application of the Act fully consistent with its underlying principles. *Id.* at 248. Only yesterday, for example, the ILA announced a boycott of all cargo destined to or originating in Poland. *Wall St. J.*, Dec. 22, 1981 at 14, col. 3. This kind of conduct confirms the wisdom of the First Circuit's warning about the "danger of uncontrolled whimsical activity." 640 at 1378, 21a.

[8] That the ILA misreads the foreign-flag ship cases is clear from its analytical approach to this case. The ILA suggests that the Court in those cases started from the premise that the Act did not apply, and that the specific exemption to Board jurisdiction recognized in those cases was but one example of the general non-applicability of the Act to disputes involving foreign entities. In the ILA's words, "the Court has never attempted to limit the non-applicability of the LMRA to foreign maritime concerns or foreign labor matters." Brief for Petitioners at 11 n.9. This orientation places the cart squarely before the horse. The conduct at issue in this case is indisputably "in commerce" as that term is commonly understood. The question then becomes one of determining whether there is some reason to exempt this activity from the normal reach of the Act. Thus, it is the ILA's burden to show why the Act should not be given its routine meaning merely because a political protest is involved in this case, and not Allied's responsibility to show that the Act applies to what would otherwise be a garden-variety secondary boycott.

ward, 415 U.S. at 114. The overriding concern of the Court in all these cases was to accommodate the broad grant of jurisdiction given to the Board[9] with the need to avoid intrusion into international maritime law and the labor policies of foreign-flag ships and, derivatively, of foreign governments. Understanding the precise rationale of this Court's decisions in the foreign flag ship cases—the need to imply an otherwise completely unjustified exception to the Board's jurisdiction in order to honor longstanding principles of comity and accommodation—is important because what is most striking about the instant case is that no comity interest could possibly be served by restrictively interpreting the NLRA so that it would not apply to the ILA's conduct. Once that rationale is understood, it is immediately apparent that the First Circuit was correct in rejecting the argument that the considerations underlying the foreign-flag ship cases were at all relevant in determining the application of the NLRA to the ILA's secondary activity.

Benz was an appeal from an Oregon state court judgment awarding damages under Oregon law against American unions that picketed a foreign-flag vessel temporarily in United States waters. The vessel was operated by foreign seamen under foreign articles of agreement. Dissatisfied with the wages and working conditions specified therein, the crew struck, designating an American union as their collective bargaining representative. Various unions subsequently picketed the ship in support of the crew's demands until the picketing was enjoined.

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[9] Section 10(a) of the Act grants jurisdiction to the Board to "prevent any person from engaging in any unfair labor practice . . . affecting commerce." 29 U.S.C. § 160(a). This Court on several occasions has held that Congress, in enacting the NLRA, sought to exercise its power under the commerce clause to the fullest extent constitutionally permissible. *Guss v. Utah Labor Board*, 353 U.S. 1, 3 (1956); *Polish National Alliance v. NLRB*, 322 U.S. 643, 647 (1944); *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 31 (1937).

The question before this Court in *Benz* was whether the Board had jurisdiction over the dispute, thereby preempting the Oregon state court. While it was clear that Congress was constitutionally empowered to make the Act applicable to labor disputes arising on foreign ships docked in American ports, the Court reviewed the Act and its legislative history and concluded that, in the absence of an "affirmative intention clearly expressed," Congress could not be thought to have intended to intrude into the labor relations of a foreign entity by extending the jurisdiction of the Act to cover "labor disputes between nationals of other countries operating ships under foreign laws." 359 U.S. at 143. Restricting the Board's jurisdiction in these circumstances was appropriate because "the possibilities of international discord [were] so evident and retaliative action so certain." 359 U.S. at 143.

Avoidance of conflict with foreign labor or maritime laws was the basis for this Court's later decisions in the companion cases of *McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10 (1963) and *Incres Steamship Co. v. Maritime Workers*, 372 U.S. 24 (1963). In *McCulloch* this Court held that the Board had no jurisdiction to conduct a representation election on Honduran vessels manned by Honduran crews. An American union seeking to organize the crews had filed a representation petition with the Board. This Court, stressing that the Board's assertion of power had "aroused vigorous protests from foreign governments," 372 U.S. at 17, found that the Act "as written was [not] to have any application to foreign registered vessels employing alien seamen." 372 U.S. at 19.[10] A different interpretation of

[10] The Court's analysis has been described as relying on a "territorial interpretation" of the Act. Comment, *Annual Survey of Labor Law*, 20 B.C.L. REV. 63, 66 (1978). *McCulloch* thus limits the application of the Act "to those instances where neither the situs nor the impact of the labor dispute were within the territorial United States." *Id.* at 66. It requires little argument to prove that both the situs and the impact of the ILA's boycott are within the territorial United States and thus in commerce.

the jurisdictional provisions of the Act, which would have allowed the United States to exercise its "jurisdiction over and apply its laws to the internal management and affairs" of foreign flag carriers, would have resulted in "considerable disturbance not only in the field of maritime law but in international relations as well." 372 U.S. at 19-20.[11]

The result in *Incres* followed from *McCulloch*. *Incres* involved an American labor union which, in pursuit of its attempt to organize the foreign crews of two Liberian registered ships, picketed the two ships, thereby persuading longshoremen and tugboat crews not to service them. The ships' owners successfully sued for an injunction in a New York state court. This Court decided that the Board did not have jurisdiction over the dispute, stating that it did not think that a "different result as to Board jurisdiction [followed] from the fact that" *Incres* involved "the picketing of a foreign-flag ship by an American union", 372 U.S. at 27, whereas *McCulloch* dealt with the Board's attempt to conduct a representation election on a foreign-flag ship. The Court concluded that neither representation elections nor unfair labor practices involving foreign-flag ships are within the jurisdiction of the Board since "foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of § 2(6)" of the Act. 372 U.S. at 27. In so construing the Act, this Court again stressed the possibility of conflict with foreign labor and maritime laws, observing that the American union's activities were "directly related to Incres' employer-employee relationships." 372 U.S. at 28.

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[11] The concern over principles of comity articulated in *McCulloch* was a very real one, as the assertion of Board jurisdiction there, contrary to established principles of international maritime law and policy, could well have sparked an international incident. The difference between the effect of Board jurisdiction in *McCulloch* and in the instant case is so striking as to require no further comment. Since the comity concern expressed in later cases is derived from *McCulloch*, it is clear that they are equally inapposite.

The Court has made clear, however, that the application of the Act does not depend on the mere fact that a foreign entity may have some involvement in a dispute otherwise in commerce.[12] Thus, in *ILA Local 1416 v. Ariadne Shipping Co.*, 397 U.S. 195 (1970), this Court affirmed the jurisdiction of the Board over secondary picketing by American longshoremen in protest of substandard wages paid to United States resident long-

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[12] In fact, the Board has held repeatedly that the presence of foreign entities in domestic disputes is no bar to its jurisdiction. For example, the Board has asserted jurisdiction over an organizing campaign directed at the Chicago branch office of the official banking agency of the government of India. *State Bank of India*, 229 N.L.R.B. 838 (1977). In that case, the Board declined to read *Benz* and *McCulloch* as grounds for refusing to apply the Act, finding that neither case "dealt with the issue of foreign governments or their agents as employers doing business within the territorial United States." 229 N.L.R.B. at 841. The Board distinguished *Benz* and *McCulloch* concluding that they were based on the Court's reluctance to give "extraterritorial effect" to the Act, thereby involving the Board in the "delicate field of international relations." 229 N.L.R.B. at 841 (quoting *Benz*, 353 U.S. at 147). Given that both the situs and the impact of the dispute involved in *State Bank of India* were within the territorial United States, the Board found no impediment to its jurisdiction in the fact that the bank was arguably an instrumentality of a foreign government, absent a showing of the likelihood of international conflict. 229 N.L.R.B. at 841. A similar result obtained in *S.K. Products Corp.*, 230 N.L.R.B. 1211 (1977), in which jurisdiction was asserted over a dispute involving a company that was a wholly-owned subsidiary of a Yugoslavian enterprise closely related to the government of that country. The Board explained its assertion of jurisdiction by stating that:

> We are bound to ensure the enforcement of the Federal statute we administer and to afford employees in this country the freedom and rights and duties specified by that statute. By asserting jurisdiction herein, we are exercising national sovereignty in accord with generally accepted rules of international law. *We see no possible conflict*, under the charter of the United Nations or the constitution of the Socialist Federal Republic of Yugoslavia, with the Yugoslav government.

Id. at 1214 (emphasis added). *Accord, Great Lakes Dredge and Dock Co.*, 240 N.L.R.B. 197 (1979).

shoremen performing work on foreign vessels. The Court found "no evidence that [the resident longshoremen] were involved in any internal affairs of [the ships] which *would be governed by foreign law.*" 397 U.S. at 199 (emphasis added). The Court concluded that "[a]pplication of United States law to resolve a dispute over the wages paid the [nonunion American] men for their longshore work . . . would have threatened no interference in the internal affairs of foreign-flag ships *likely to lead to conflict with foreign or international law.*" 397 U.S. at 200 (emphasis added).

Benz, *McCulloch*, *Incres*, and *Ariadne* clearly establish that the criterion for determining whether the Act applies to disputes involving foreign entities is whether the exercise of Board jurisdiction would lead to a conflict with foreign labor or maritime laws or policies. Where foreign or international maritime law is not impacted by the Board's assertion of jurisdiction in a domestic dispute, these cases provided no support for concluding that the Act should not apply. Careful analysis of *Windward* and *Mobile* necessarily begins with this recognition.

In *Windward* members of several American maritime unions picketed foreign flag ships which employed foreign crewmen at wages substantially below those paid to American seamen. The dispute in *Windward* grew out of traditional labor concerns and was directed at foreign-flag ships whose employment practices were objectionable to American seamen. Simply put, the American seamen wanted jobs which they believed were unjustly being taken from them by foreign seamen who were willing to work for a lower rate of pay.

The Court began its analysis with this description of the earlier foreign flag ship cases:

> In a series of cases decided over the past 17 years, this Court has discussed the application of the Labor Management Relations Act in situations which might be *broadly described as disputes between unions rep-*

> *resenting workers in this country and owners of foreign flag vessels* operating in international maritime commerce.

415 U.S. at 109 (emphais added). Thus, the *Windward* Court thought that a "broad" reading of the dispositive cases would be one characterizing them as cases involving labor disputes directed at the operation of foreign-flag vessels. The Court reasoned that the Board lacked jurisdiction in those cases in which application of the Act could be used "to erase longstanding principles of comity and accommodation in international maritime trade." 415 U.S. at 113.[13]

The Court then turned to the specific situation presented in *Windward* and observed:

> The picketing activities in this case do not involve the inescapable intrusion into the affairs of foreign ships that was present in *Benz* and *Incres*; respondents seek neither to organize the foreign crews for purpose of representation nor to support foreign crews in their own wage dispute with a foreign shipowner. But those cases do not purport to fully delineate the threshold of interference with the maritime operations of foreign vessels which makes the LMRA inapplicable.

Id. at 113-14. This Court, thus, unequivocally described the case before it as one involving a labor dispute the objective of which was to interfere "with the maritime operations of foreign vessels." Although the case did "not involve the inescapable intrusion into the affairs of foreign ships" found in earlier cases, it is clear that "intrusion into the affairs of foreign ships" was still the problem confronting the Court. In the earlier foreign-flag ship cases American unions directly interfered with the ship-

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[13] The nature of the *Windward* Court's concern is also shown by its reliance on *Lauritzen v. Larsen*, 345 U.S. 571 (1953), interpreting the Congressional intent of the Jones Act, and its announced reluctance to disrupt the "comprehensive body of [maritime] law." 415 U.S. at 113.

board labor relations of foreign flag vessels by attempting to organize the existing crew or by supporting the existing crew's wage demands. In *Winward*, the American unions were seeking jobs for American workers, but their method for realizing this goal, the picketing of foreign flag ships, while indirect, nonetheless threatened to interfere with the use and operation of these ships. The statement that the intrusion there was not "inescapable" means only that the Court concluded that principles of comity would preclude the exercise of Board jurisdiction in situations that would cause a conflict with international maritime trade other than those presented by the precise facts of cases such as *McCulloch*. There is not one word in *Windward* to suggest that this Court was setting forth principles that would be applicable to all labor disputes involving foreign entities, much less politically motivated disputes between American employers and American unions and employees remotely caused by the actions of a foreign government. The Court merely clarified the principles articulated in the earlier foreign-flag ship cases to the effect that the Act should not be extended to situations that would cause a conflict with "foreign or international law." *Ariadne*, 397 U.S. at 200.

The situation in *Windward* stands in sharp contrast to that of the instant case in which the gravamen of the ILA's complaint was not directed at the operation or use of foreign flag ships. It mattered not at all to the ILA whether the boycotted Soviet cargo was carried in Soviet ships, American ships employing union labor, or automated tubs employing robot pilots. The ILA engaged in secondary pressure because, for political reasons, it hoped to coerce Occidental and other employers into stopping trade with the Soviet Union. The dispute in this case was not directed at the operation or use of foreign-flag ships; application of the Act would not result in a conflict with foreign or international law.

The foreign-flag ship cases are, therefore, inapposite to the instant case. Accordingly, detailed analysis of this

Court's later decision in *Mobile* is not warranted.[14] *Mobile* is identical to *Windward*, with the exception that the plaintiff in *Mobile* was an association representing American stevedoring companies rather than a foreign shipowner. *Mobile*, 419 U.S. at 219. As in *Windward*, the *Mobile* Court was concerned with the consequences of the exercise of Board jurisdiction over a dispute directed at foreign-flag ships. The Court concluded that the Board was without jurisdiction because "Congress did not intend to strain through the filament of the NLRA picketing activities which so directly affect the maritime operations of foreign vessels." *Id.* at 228. The contrast between the dispute in *Mobile* and the dispute in the instant case could not be more apparent. No intrusion, inescapable or otherwise, into the affairs of foreign-flag ships could possibly result from the application of the NLRA to the dispute in this case.

The significance of *Mobile* in this case is the Court's recognition that its holding:

> need cast no doubt on those cases which hold that the Board has jurisdiction under § 8(b)(4) of domestic secondary activities which are in commerce, even though the primary employer is located outside the United States. *See Madden v. Grain Elevator Workers Local 418*, 334 F.2d 1014 (CA7 1964), cert. denied, 379 U.S. 967 (1965); *Grain Elevator Workers Local 418 v. NLRB*, 376 F.2d 774, cert. denied, 389 U.S. 932 (1967).

Id. at 225 n.10. The *Grain Elevator Workers* cases involved concerted refusals by American unions representing American employees to load an American shipper's grain onto Canadian ships because of the Canadian em-

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[14] The ILA's suggestion that *Mobile* implies that application of the NLRA to this case would amount to an illegitimate "bifurcation" of the dispute is without merit. Such an assertion begs the very question posed in this case: should *Windward* and *Mobile* be extended far beyond their holdings and rationales to extend to any domestic dispute involving a foreign entity.

ployer's dispute with Canadian unions. This Court's approval of the decisions in these cases clearly indicates that the mere fact that a dispute is occasioned by the actions of a foreign entity does not, without more, imply that the dispute, insofar as it involves American employers, unions and employees, is not subject to the provisions of the NLRA. A restrictive interpretation of the reach of the Act is warranted only if its application would pose a danger of conflict with foreign labor or maritime laws or policies.

Because *Windward* and the other foreign flag ship cases are distinguishable, language in *Windward* to the effect that the Board was without jurisdiction because "the protest . . . could not be accommodated by a wage decision on the part of the shipowners which would affect wages paid within this country," 415 U.S. at 114, or because "none of the predictable responses of a foreign shipowner to picketing of this type would be limited to the sort of wage-cost decision benefiting American workingmen which the LMRA was designed to regulate," *id.* at 115, is simply irrelevant to this case. The quoted language makes sense only in the context of a labor dispute that is directed at the operation and use of foreign-flag ships. Of course there is no wage decision affecting American workingmen, or any other decision about terms and conditions of employment, that could have accommodated the ILA in this case; however, that is for the rather obvious reason that, unlike the picketing unions in *Windward* and *Mobile*, the ILA was not disputing the terms and conditions of employment of American workers, or the terms and conditions of employment of foreign workers.[15]

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[15] To the extent that the ILA's boycott did have a business-related objective it was to force Occidental, and the other importers and exporters, to cease dealing with the Soviet Union. Accordingly, even if it were true that *Windward* stands for the general proposition that the NLRA does not apply to disputes which can only be resolved through decisions on the part of foreign entities, the

The ILA is thus mistaken when it seizes upon these isolated passages from this Court's decision in *Windward* and converts them into an all-purpose test for determining the applicability of the NLRA to disputes involving foreign entities. Brief for Petitioners at 5, 9, 12. From *Benz* through *Mobile* this Court was concerned with one thing: developing a test for determining the jurisdiction *vel non* of the Board over labor disputes directed at the use and operation of foreign flag ships. The ILA's position essentially is that this Court should employ the test it developed for Board jurisdiction in this one particular type of case for all cases that in some way involve foreign entities. However, as the First Circuit concluded, there is no warrant for extrapolating *Windward* beyond its holding. An extension of *Windward* would make sense only if there were a policy reason for doing so. If anything is clear about this case it is that no identifiable policy could possibly be served by this Court's holding that the NLRA was inapplicable to the ILA's conduct. The foreign-flag ship cases and the instant case differ in this essential respect: in the instant case there is no labor dispute directed at the use and operation of foreign-flag ships and, therefore, no comity interest to be served by a restrictive interpretation of the NLRA.[16]

Act would still apply to the ILA's boycott because, unlike the picketing in *Windward*, the boycott would have accomplished its objective as soon as Occidental and the other American companies lawfully trading with the Soviets acceded to the ILA's secondary pressure. The primary dispute in this case then would have been resolved independently of any action taken by the Soviet Union.

[16] Even if the most expansive interpretation possible is given to this Court's decisions in *Windward* and *Mobile*—namely that the NLRA does not apply if its application might have a detrimental impact on international relations in general, and not just when there is a danger of conflict with foreign labor or international maritime laws or policies—these cases still would not preclude application of the Act to the ILA's boycott. Application of the NLRA in *Windward* might have resulted in a finding that the unions' activities were

The ILA asserts that the principles of comity underlying the foreign-flag ship cases would make it anomalous to find the Act applicable to a politically motivated boycott. Such an argument evinces an erroneous understanding of the meaning of comity. Comity, after all, is nothing more than a way of resolving a conflict between domestic law and foreign law by giving voluntary recognition to "the legislative, executive or judicial acts of another nation." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). In the foreign-flag ship cases this Court refused to apply the Act because of a possible conflict with foreign labor or maritime laws or policies. It is manifest, however, that where there is no competing labor or maritime law or policy, comity considerations are irrele-

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protected, thus depriving the foreign shipowners of any remedy, including remedies in state court. International relations may have suffered as a result. In this case, a finding that the ILA did not violate 8(b)(4) would *not* imply that the ILA's activities were protected. Because the ILA's boycott was "purely political" and thus had no bearing on the employer-employee relationship, there is in fact no conceivable argument for saying that its conduct was protected activity under the Act. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567-78 (1978). At worst (from the perspective of the affected foreign entity), application of the NLRA would result in a finding by the Board that the ILA's boycott was neither prohibited nor protected. The foreign entity would then still have its remedy in state court. *Mobile*, 419 U.S. at 242 (Stewart, J., dissenting). In that sense, contrary to what the ILA maintains, there is no "possibility that the Board will rule in favor of the union." Brief for Petitioners at 20. Accordingly, application of the NLRA, whatever the outcome of the case, could not possibly have an adverse impact on international relations.

In this regard it should be noted that in its *amicus curiae* brief filed in this case, the American Federation of Labor and Congress of Industrial Organizations erroneously argues that *Windward* and *Mobile* preclude application of the Act if the "Union's *activity* . . . intruded significantly into the area of world trade and posed delicate issues of foreign diplomacy and international relations." AFL-CIO Brief at 8 (emphasis added). The Court's concern has uniformly been with the impact of the Board's jurisdiction on international relations, not with the impact of the complained of activity.

vant and domestic law, in this case the NLRA, should apply. As this Court concluded in *Ariadne*, "[a]pplication of United States law . . . [is appropriate if there is] no interference in the internal affairs of foreign-flag ships likely to lead to *conflict* with foreign or international law." 397 U.S. at 200 (emphasis added). The fact that the ILA's boycott is not directed at interfering with or changing a foreign entity's labor laws or policies, therefore, completely undercuts any argument that the NLRA should not apply.[17]

Put as simply as possible: the NLRA applies to the ILA's politically motivated boycott because, in contrast to the disputes at issue in the various foreign-flag ship cases, no identifiable comity interest would be served by construing the NLRA so that it would not apply.

III. THE ILA'S CLAIM THAT ITS BOYCOTT ACTIVITY IS PROTECTED BY THE FIRST AMENDMENT IS WITHOUT MERIT

There is no support for the ILA's claim of first amendment protection for the coercive activity in which it has engaged. This Court decided long ago that the prohibition of secondary boycotts by Section 8(b)(4) of the Act carries no constitutional abridgement of free speech. *IBEW v. NLRB*, 341 U.S. 694, 705 (1951).

Despite the unimpeachable constitutionality of Section 8(b)(4), the ILA insists that, at least as applied to the facts of the instant case, Section 8(b)(4)'s prohibition of secondary boycotts violates the first amendment. The

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[17] Indeed, the anamoly in this case would be to accept the ILA's argument that all domestic disputes involving foreign entities should be resolved in state court. Not only would such a result be inconsistent with the policies of the Act favoring a uniform approach to labor relations issues, the likely result of a hodge-podge of inconsistent state court results would scarcely further the interests of comity. Comment, *Protest Boycotts and Federal Labor Laws: The Russian Boycott Litigation*, 3 NW. J. INT'L. L. & BUS. 211, 249 (1981).

ILA seeks to distinguish the instant case by arguing that it involves a political, and thus a "non-economic",[18] dispute. The ILA maintains that, through their concerted refusal to work, the longshoremen were expressing their disapproval of the Soviet Union's invasion of Afghanistan. However, that this case involves a politically motivated work stoppage is of no significance, because this Court has not distinguished between labor and political disputes in applying the first amendment. As the Court stated in *Thomas v. Collins*, 323 U.S. 516, 538 (1945), "espousal of the cause of labor is entitled to [the same] constitutional protection [as] the espousal of any other lawful cause."

In any event, the ILA's conduct is not immune from reasonable government regulation simply because it may have incidentally expressed a political message.[19] This Court has repeatedly and emphatically rejected the notion that "the first and fourteenth amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing . . . as these amendments afford to those who communicate ideas by pure speech." *Cox v. Louisiana*, 379 U.S. 536, 555 (1965). *Accord, Grayned v. City of Rockford*, 408 U.S. 104, 115-118 (1972); *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966).

It is clear then that the ILA's concerted refusal to work is amenable to restrictive regulation, however "ex-

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[18] Brief for Petitioners at 37.

[19] Similarly, any suggestion that the ILA's secondary boycott serves as a means of religious or moral expression adds nothing to its claim of first amendment protection. There is no support in the case law for such a theory. Moreover, it is well settled that there is a distinction under the first amendment between the freedom to hold religious beliefs and the freedom of conduct based on religious beliefs. The latter is subject to reasonable governmental regulation. *See, e.g., Prince v. Massachusetts*, 321 U.S. 158 (1944); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Reynolds v. United States*, 98 U.S. 145 (1879).

pressive" the refusal to work may be.[20] It surely cannot be maintained that a secondary boycott constitutes "pure" speech.[21] If the ILA's illegal activity succeeds in expressing any ideas at all it does so only symbolically.[22] Government regulation of symbolic speech is constitutionally appropriate whenever it is determined that the regulation furthers "an important or substantial government interest [that] is unrelated to the suppression of free expression [provided] the . . . restriction . . . is no greater than is essential to the furtherance of that

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[20] It is questionable whether the secondary boycott at issue in this case can properly be regarded as a form of speech. This Court has stated that it "cannot accept the view that an apparently limitless variety of conduct can be labeled speech whenever the person engaging in the conduct intends thereby to express an idea." *United States v. O'Brien*, 391 U.S. 367, 376 (1968).

[21] As the First Circuit pointed out in the decision below, the "union-directed work stoppage at issue here is much farther removed from 'pure expression' than the peaceful picketing that has been found to violate Section 8(b)(4) in numerous cases." 640 F.2d at 1379, 23a. It is noteworthy that this case thus does not involve those aspects of secondary activity regulated by Section 8(b)(4) that may give rise to serious concern over first amendment issues. *See NLRB v. Retail Store Employees Local 1001*, 447 U.S. 607, 616 (1980); *cf. Teamsters Local 659 v. Vogt, Inc.*, 354 U.S. 284, 290 (1957); *Hughes v. Superior Court*, 339 U.S. 460, 464-65 (1950); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (all cases upholding state court injunctions against unlawful peaceful picketing).

[22] This case is in marked contrast to *Tinker v. Des Moines School District*, 393 U.S. 503 (1969). In *Tinker*, the Court found protected the wearing of black armbands by school children protesting the Vietnam war while at school because, although the speech was symbolic, under the circumstances of the case it was "closely akin to 'pure speech.'" *Id.* at 505. The Court found dispositive the fact that "the wearing of armbands was entirely divorced from actually or potentially disruptive conduct by those participating in it." The conduct accompanying the "symbolic speech" at issue in the instant case is clearly and dangerously disruptive. Indeed the disruption, *i.e.*, the concerted refusal to work, is itself the symbol, and, therefore, clearly subject to reasonable regulation.

interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The prohibition of secondary boycotts contained in Section 8(b)(4) unquestionably meets this test.

The crucial question to be answered in applying the *O'Brien* test is whether the governmental interest is in the communicative content of the conduct or whether speech is totally unrelated to the government's objective, *i.e.*, would the conduct be subject to regulation if it communicated nothing. In the instant case the answer is clear. The "substantive evil condemned by Congress," *IBEW v. NLRB*, 341 U.S. at 705, in Section 8(b)(4) is the secondary boycott. Congress made no distinction as to the nature of the dispute which engendered secondary activity. As this Court has recognized, Congress' concern was to prevent the substantial and unjustified interference with commerce that would result from allowing a union to embroil a neutral employer in a dispute not its own. *National Woodwork Manufacturers Association v. NLRB*, 386 U.S. at 624; *NLRB v. Denver Building Council*, 341 U.S. at 692. Thus, Congress intended to put an end to injurious conduct. It did not intend to interfere with speech unrelated to illegal secondary activity. Nor, as the legislative history of Section 8(b)(4) indicates, *supra*, pp. 7-8, did Congress intend to protect otherwise illegal secondary activity merely because the activity incidentally expressed some commercial, political, religious or moral message.

Since the relevant governmental interest is "unrelated to the suppression of free expression," the remainder of the *O'Brien* test is easily satisfied. It is indisputable that Section 8(b)(4)'s prohibition of secondary boycotts furthers a legitimate and important government interest, *viz.*, the free flow of commerce. The ILA's near-monopoly of the relevant labor force insures that any ILA-sponsored boycott will result in substantial interference with the free flow of trade. The government's interest in the free flow of commerce does not depend on whether a secondary boycott is motivated by commercial

or political concerns. This Court has explicitly stated that "[t]here can be no doubt that Congress may, under its constitutional power to regulate commerce among the several states, attempt to prevent *political* strikes and other kinds of direct action designed to burden and interrupt the free flow of commerce." *American Communications Association v. Douds*, 339 U.S. 382, 390 (1950) (emphasis added). If community interests in unimpeded traffic flow or a reasonable noise level in a school zone can justify restrictions on speech, *see, e.g., Grayned*, 408 U.S. at 115-18 (1972), *Cox v. New Hampshire*, 312 U.S. 569, 574 (1941), it is obvious that the protection of individual employers and the national economy from ruinous financial losses also justifies limited restrictions.

Similarly, *O'Brien's* requirement that the restriction on speech be no greater than is necessary to further the government's interest poses no problem on these facts. Section 8(b)(4) does not impose any superfluous restriction on the freedom of speech. It only prohibits the use of coercion to bring about unwarranted disruptions in the normal flow of commerce. *See Thomas v. Collins*, 323 U.S. at 543-544 (concurring opinion of Douglas, J.) (economic power used to influence others unprotected by first amendment). The ILA's contention that it will be denied the right "to protest and disassociate itself from the Soviet aggression" if it is found to have violated Section 8(b)(4)[33] is preposterous. If the ILA, as an association, has any constitutional rights, it certainly is not entitled to any greater constitutional protection than are its members. Individual longshoremen have the undeniable right independently to refuse to undertake work they find repugnant. What the ILA does not have the right to do is to *order* longshoremen to engage in a concerted refusal to work.[34] Nor does the ILA have a right.

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[33] Brief for Petitioners at 37 n.52.

[34] The January 9, 1980 directive of ILA President Gleason specifically states that the leadership of the ILA has "*ordered* immediate

under Section 8(b)(4) or the first amendment, to exert its formidable economic power to conscript employers into taking part in the ILA's dispute with the Soviet Union.

It is significant, of course, that the two courts of appeals which have addressed this specific issue both have concluded that the ILA's boycott is not protected by the first amendment. In the decision below the First Circuit rejected the ILA's first amendment claims, observing that "[b]y resorting to coercive tactics against neutral parties, the union has exceeded the bounds of 'political expression' in its pure form." 640 F.2d at 1379, 23a. The Fifth Circuit, in its decision in *New Orleans Steamship Association v. General Longshore Workers Local 1418*, 626 F.2d 455, 462-64 (5th Cir. 1980), *cert. granted sub nom. Jacksonville Bulk Terminals v. ILA*, No. 80-1045, similarly concluded that the ILA's conduct was subject to reasonable governmental regulation, and that an injunction against the ILA's coercive activity would in no way violate the first or the thirteenth amendments.

Thus, the ILA's claim of constitutional protection for its coercive activity is totally without merit. The only factor working in the ILA's favor is the unusual setting for this case. Were this an ordinary labor dispute involving a secondary boycott, the ILA's claim of first amendment protection would be immediately recognized as frivolous. Were this a case entirely divorced from labor relations, but involving disruption of commerce on a scale only remotely approaching the disruption resulting from the ILA's boycott (consider, *e.g.*, a political protest which blocks access to a nuclear power plant), any argument for first amendment protection would be similarly recognized as groundless. The fact that an

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suspension in handling all Russian ships and . . . cargoes" and that "[t]his *order* is effective across the board." *Allied International*, 640 F.2d at 1369 n.2., 3a (emphasis added).

otherwise illegal work stoppage also serves political ends should not and does not make it constitutionally immune from appropriate regulation.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL., PETITIONERS

v.

ALLIED INTERNATIONAL, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This case involves the application of the prohibition on secondary boycotts in Section 8(b)(4)(B) of the National Labor Relations Act (NLRA), 29 U.S.C. 158(b)(4)(B), to work stoppages called by the International Longshoremen's Association (ILA) as a protest against the invasion of Afghanistan by the Union of Soviet Socialist Republics (USSR). The National Labor Relations Board (the Board), which is responsible for administering the provisions of the NLRA, recently issued a decision in a related case involving these same parties, in which it found, as did the court of appeals in this case, that the conduct at issue violated Section 8(b)(4)(B) of the NLRA. *International Longshoremen's Association, AFL-CIO (Allied International, Inc.)*, 257 N.L.R.B. No. 151 (Aug. 28, 1981).[1] See also Brief

[1] A copy of that decision is appended to the Supplemental Memorandum for the United States as Amicus Curiae, hereafter referred to as "S.M."

There are currently pending before the Board two additional cases involving issues essentially the same as those presented in

for the United States as Amicus Curiae, No. 80-1045, at 1-2 (describing pertinent interests of the Departments of State and Agriculture).

STATEMENT

Allied International, Inc. (Allied), a Massachusetts corporation, imports wood products from the USSR pursuant to a contract with a USSR government agency. Allied contracted with Waterman Steamship Corp. (Waterman), a steamship line operating ships of United States registry, for the shipment of these wood products from the USSR to ports on the East and Gulf coasts of the United States. At Boston, Waterman employed John T. Clark & Son of Boston, Inc. (Clark), a stevedoring company, to unload its ships. Clark regularly obtains all of its longshore employees from a hiring hall maintained by petitioner ILA Local 799 (Local 799) pursuant to a collective bargaining agreement between Local 799 and the Boston Shipping Association, of which Clark is a member. (Pet. App. 2a; J.A. 24a, 29a, 31a, 33a-35a, 45a.)

On January 9, 1980, ILA President Gleason issued a statement protesting the USSR's invasion of Afghanistan and ordering all ILA members employed in ports on the East and Gulf coasts to cease handling all cargo destined to, or arriving from, the USSR (Pet. App. 3a; J.A. 35a, 60a).[2] On that date, Waterman's ship, the WAL-

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this case. *International Longshoremen's Association (Occidental Chemical Co.)*, Case Nos. 10-CC-1141-1 *et al.*, JD 98-81 (Mar. 16, 1981), and *International Longshoremen's Association (Kansas Farm Bureau)*, Case Nos. 23-CC-764-1, *et al.*, JD 99-81 (Mar. 16, 1981).

[2] The directive stated (Pet. App. 3a n.2; J.A. 10a-11a, 60a):

> In response to overwhelming demands by the rank and file members of the Union, the leadership of ILA today ordered immediate suspension in handling all Russian ships and all Russian cargoes in ports from Maine to Texas and Puerto Rico where ILA workers are employed.
>
> This order is effective across the board on all vessels and all cargoes. Grain and other foods as well as high valued general

TON, arrived at Boston bearing a shipment of wood products that Allied had purchased from the USSR, and began discharging a portion of its cargo there prior to transporting the remainder to other East and Gulf coast ports. Upon learning of ILA President Gleason's boycott announcement that day, Allied's President Gildea telephoned Gleason, explained the situation, and asked Gleason whether the WALTON would be able to deliver the remainder of Allied's cargo to the other scheduled ports. Gleason responded that he had to "draw the line" somewhere and, consistent with his announcement, stated that the ship could discharge USSR cargo only at Boston, the port in which it was located when his order was issued (Pet. App. 3a; J.A. 35a-36a.)

When Waterman was informed that longshoremen employed at the WALTON's remaining ports of call would not handle cargo from the USSR, it cancelled the WALTON's voyage to those ports and had the entire cargo discharged at Boston. Waterman also substantially reduced the amount of Allied's wood products being loaded onto the MIDDLETON at a USSR port and rerouted that vessel from Boston and Gulf coast ports to Montreal, Canada. Thereafter, Waterman cancelled its agreement to transport Allied's cargo from the USSR and

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freight. However, any Russian ship now in process of loading or discharging at a waterfront will be worked until completion.

The reason for this action should be apparent in light of international events that have affected relations between the U.S. and the Soviet Union.

However, the decision by the Union leadership was made necessary by the demands of the workers.

It is their will to refuse to work Russian vessels and Russian cargoes under present conditions in the world.

People are upset and they refuse to continue the business as usual policy as long as the Russians insist on being international bully boys. It is a decision in which the Union leadership concurs.

refused to load Allied's wood onto the JEFFERSON at a USSR port. (Pet. App. 3a; J.A. 35a-38a, 41a-44a.)[3]

In response to inquiries by Allied officials, on March 12 and 25, 1980, representatives of ILA and Local 799 affirmed that longshoremen at Boston would not unload any cargo originating in the USSR so long as ILA President Gleason's directive remained effective (J.A. 39a-40a, 46a-47a). Allied filed charges with the Board alleging that the ILA's boycott violated Section 8(b)(4)(B) of the NLRA, 29 U.S.C. 158(b)(4)(B), and brought the instant suit in the United States District Court for the District of Massachusetts seeking, *inter alia*, damages under Section 303 of the Labor-Management Relations Act, 1947 (LMRA), 29 U.S.C. 187, for the same activity. The instant suit was consolidated with *Walsh* v. *International Longshoremen's Association*,[4] in which the Board's Regional Director sought a preliminary injunction against the boycott pursuant to Section 10(*l*) of the NLRA, 29 U.S.C. 160(*l*).

In *Walsh*, the district court denied the Regional Director's request for a preliminary injunction. It found that, since "the controversy concerns the actual passage of goods from the U.S.S.R. to a consignee in the United States," the boycott activity was "in commerce" within the meaning of the NLRA. 488 F. Supp. 524, 528 (D. Mass. 1980). However, the court concluded that Section 8(b)(4)(B) of the NLRA does not apply "where a purely political dispute has provided the basis of a secondary boycott," and does not "prohibit the exercise of political protest by a union and its members." 488 F. Supp. at 530. The court further concluded that, even assuming that Section 8(b)(4)(B) did apply to political disputes, the ILA "has not induced a strike against

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[3] Because of the ILA's boycott, Allied ultimately renegotiated its contract with the USSR so as to reduce substantially the amount of wood products purchased from that country (J.A. 26a-27a, 40a).

[4] 488 F. Supp. 524 (D. Mass.), vacated and remanded with instructions to dismiss on res judicata grounds, 630 F.2d 864 (1st Cir. 1980).

Allied, Waterman, or Clark; nor does it seek to pressure those employers not to deal with one another." 488 F. Supp. at 530. Rather, "[u]nion members have simply declined to accept employment on certain ships, as a form of political protest." *Id.* at 530-531. This, the court concluded, "is a primary boycott of Russian goods, with [only] incidental effects upon those employers who deal in such goods." *Id.* at 531.

Applying its holding in *Walsh* as the "law of the case" in the instant suit, the district court dismissed the secondary boycott allegations of the complaint for failure to state a claim. *Allied International, Inc.* v. *International Longshoremen's Association*, 492 F. Supp. 334, 336 (D. Mass. 1980).[5] Allied appealed and the court of appeals, finding that the district court's dismissal of the secondary boycott allegations was erroneous, vacated that dismissal and remanded the case for further consideration. Pet. App. 1a-37a; 640 F.2d 1368.[6]

The court of appeals concluded that, inasmuch as "[t]he *only* labor-related activity in issue has been played out by an all-American cast," the ILA's boycott was "in commerce" within the meaning of the NLRA even though it was "inspired by military events in foreign lands—events far beyond NLRB jurisdiction" (Pet. App. 13a).[7] The court also concluded that the other elements

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[5] The district court also dismissed the other portions of the complaint, which sought injunctive and monetary relief for violation of the Sherman Act, 15 U.S.C. 1, and for tortious interference with business relations. 492 492 F. Supp. at 339.

[6] The court of appeals meanwhile had affirmed the district court's denial of injunctive relief in *Walsh* without reaching the merits, for it gave res judicata effect to the denial of the request of another Regional Director of the NLRB for a temporary injunction against the ILA's work stoppage in Texas (see *Baldovin* v. *International Longshoremen's Association*, 626 F.2d 445 (5th Cir. 1980)). *Walsh* v. *International Longshoremen's Association*, 630 F.2d 864 (1st Cir. 1980). Because the NLRB was not a party to the instant case, that holding did not bar consideration of the merits in this case.

[7] Judge Aldrich dissented on this point (Pet. App. 29a-33a).

of a Section 8(b)(4)(B) violation were established. Thus, the court noted that "it is uncontroverted that the ILA leadership directed ILA members, * * * employees of Clark, to engage in a concerted refusal to handle a certain class of goods which Clark had contracted to service" (Pet. App. 14a). And, notwithstanding ILA's assertion that its " 'sole object is to vindicate the consciences of its members who find it repugnant to do business as usual with the aggressor and, by passive action, to protest politically the invasion of Afghanistan' " (*ibid.*), the court found that "the ILA has chosen to carry out its goal of protest through action—a selective work stoppage—which by its very nature is designed to force at least partial cessation of business between companies with which ILA has no labor-related grievances" (*ibid.*). The court also found "no reason why [Section 8(b)(4)(B)] should not prohibit such secondary pressure, for whatever reasons motivated," including pressure brought in support of "a random political objective far removed from what has traditionally been thought to be the realm of legitimate union activity" (Pet. App. 21a). Finally, the court concluded that the ILA's "resort[] to coercive tactics against neutral parties * * * exceeded the bounds of 'political expression' in its pure form" and therefore its activity was not protected by the First Amendment (Pet. App. 23a-24a).

SUMMARY OF ARGUMENT

I

In furtherance of a political dispute with the USSR, petitioners (the ILA and its agents) induced employees of an American stevedoring company (Clark) to refuse to unload wood products that Allied had purchased from the USSR and that were being transported on an American ship owned by Waterman—thereby causing a disruption of business relations among these American companies. Although "it might appear too plain for discussion that the ILA's refusal to unload Allied's goods affects both commerce and a person engaged in commerce" (Pet. App. 6a), within the meaning of Section

2(6) of the NLRA, 29 U.S.C. 152(6), petitioners contend that their activity nonetheless falls outside the jurisdictional reach of the NLRA under a series of cases involving foreign-flag ships in which this Court has limited the terms "in commerce" as used in that Act. This contention misconceives the basis for those decisions.

Those decisions turn on the nature and thrust of the union activity involved, and not, as petitioners assert, on the circumstance that the Board lacked jurisdiction over the union's primary dispute. Thus, in *Windward Shipping (London) Ltd.* v. *American Radio Association*, 415 U.S. 104 (1974), and *American Radio Association* v. *Mobile Steamship Association*, 419 U.S. 215 (1974), the union activity consisted of primary picketing directed at the employment conditions of foreign seamen on foreign ships, conduct which the Court had previously held to be not "in commerce" within the meaning of the NLRA, and thus outside the Board's jurisdiction. Although the same picketing affected domestic employers, this effect was merely an incident of the ship picketing that was beyond the Board's reach. Here, by contrast, the union engaged in purely secondary activity against domestic employers subject to the Board's jurisdiction. Since this is the only activity involved, there is no need, as there was in *Windward/Mobile*, to separate the domestic secondary effects from activity over which the Board lacked jurisdiction. The Board can thus assert jurisdiction without interfering in foreign maritime operations or ignoring principles of comity.

II

The Board and the court below correctly found that the inevitable consequences of the ILA boycott, which petitioners had every reason to foresee, were that Russian goods would not be moved by any employees in any of the ports encompassed by the boycott, that Waterman would cease carrying Russian cargo to the boycotted ports, and that Allied would be forced to cease purchasing Russian wood for delivery to ports affected by the boycott. Under principles recently reaffirmed in

NLRB v. *Retail Store Employees Union, Local 1001 (Safeco Title Insurance Co.)*, 447 U.S. 607 (1980), the presence of the secondary object proscribed by Section 8(b)(4)(B) of the NLRA, 29 U.S.C. 158(b)(4)(B), may be inferred from this foreseeable and inevitable result of the ILA's conduct.

The Board and the court below also properly rejected petitioners' argument that their boycott was not regulated by Section 8(b)(4)(B) of the NLRA because it was not in support of a labor dispute with any primary employer and sought a political rather than an economic objective. If a boycott is "tactically calculated to satisfy union objectives elsewhere," it is secondary, and "[t]here need not be an actual dispute with the [primary] employer * * * for the activity to fall within this category * * *." *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 644-645 (1967). Moreover, as the court below concluded (Pet. App. 21a), nothing in the "language of section 8(b)(4) and the congressional objectives that prompted its enactment point to [any] reason why the section should not prohibit * * * secondary pressure, for whatever reasons motivated," including that "motivated by a 'purely political dispute.'" To accord Section 8(b)(4)(B) this scope would not impinge on the right of expression of the union and its members. For, as the court below pointed out (Pet. App. 22a-23a), "the union and its members have numerous alternative forms of 'expression' left to them."

III

The Board and the court below properly rejected petitioners' contention that their refusal to handle Russian goods was merely an expression of the conscience of the individual union members and thus privileged by the First Amendment. The uncontradicted evidence shows that the decision to boycott Russian cargo was made by the ILA leadership and was maintained in effect as a matter of ILA policy determined at the headquarters level. Thus, the ILA did more than merely disseminate information or express the union's or the members' polit-

ical views. Rather, the union induced its members to withhold their services from their employer, and thereby coerced and restrained the employer who relied on the union for its labor supply. The regulation of such inherently coercive conduct raises no First Amendment problem.

ARGUMENT

I. THE ILA REFUSAL TO HANDLE RUSSIAN CARGO WAS ACTIVITY "IN COMMERCE" AND SUBJECT TO NLRA JURISDICTION

In furtherance of a political dispute with the USSR, petitioners engaged in conduct classically subject to regulation by the Board, under Section 8(b)(4) of the NLRA, 29 U.S.C. 158(b)(4) (see *infra*, pages 17-26).[8] This conduct involved actions by American employees working for American employers and concededly caused serious injury to neutral parties. Petitioners contend (Pet. Br. 8-11) that this activity is immune from NLRA jurisdiction under this Court's decisions limiting the Board's jurisdiction in cases where the disputed conduct involved and inescapably interfered with the internal operations of foreign entities. That contention is without merit. The exercise of Board jurisdiction over this purely domestic secondary conduct does not involve regulation of the primary dispute between the ILA and the USSR; it poses no interference with foreign maritime operations, principles of comity, or international trade; it furthers the legislative purpose in enacting Section 8(b)(4) of the NLRA; and it is consistent with this Court's teachings.

The term "commerce" is defined in Section 2(6) of the NLRA, 29 U.S.C. 152(6), to include, *inter alia*, "trade,

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[8] Since Section 303 of the LMRA, 29 U.S.C. 187, provides a cause of action for damages for any person injured in his business by reason of conduct by a labor organization that is "defined as an unfair labor practice in section 158(b)(4) of this title," Allied's right to recover in the present suit on its Section 303 count is dependent on a finding that the ILA boycott violated Section 8(b)(4)(B) of the NLRA.

traffic, commerce, transportation, or communication * * * between any foreign country and any State." As the court of appeals stated (Pet. App. 6a):

> At first blush, it might appear too plain for discussion that the ILA's refusal to unload Allied's goods affects both commerce and a person engaged in commerce. Allied, Waterman and Clark are American companies and the ILA is an American union. All engage regularly in business affecting the transportation of goods among the several states. Indeed, the instant dispute arose when the ILA's actions allegedly impeded Allied's ability to move its wood products from Boston to other ports along the East Coast, and Allied contends that the ILA continues to frustrate its ability to transport its goods into this country.

However, in a series of cases involving foreign-flag ships, this Court has limited the terms "in commerce" and "affecting commerce" as used in the NLRA.

Thus, in *Benz* v. *Compania Naviera Hidalgo*, 353 U.S. 138 (1957), the Court held that the NLRA did not extend to picketing of a foreign-flag ship by American unions in support of a strike staged by foreign seamen against their foreign shipowner-employers. Finding that Congress did not intend the Act to cover "wage disputes arising on foreign vessels between nationals of other countries" (*id.* at 142), the Court concluded that the Act did not preempt a state law damage action brought by the shipowners against the unions.

Incres Steamship Co. v. *International Maritime Workers Union*, 372 U.S. 24 (1963), joined the *Benz* legislative history rationale to the Act's "affecting commerce" terminology. *Incres*, like *Benz*, considered whether the NLRA deprived a state court of jurisdiction over picketing of foreign-flag ships by American unions in support of a labor dispute between the shipowners and a foreign crew. Concluding that "maritime operations of foreign-flag ships employing alien seamen are not in 'commerce' within the meaning of [NLRA] § 2(6)" (372 U.S. at 27), the Court held that the NLRA did not protect the

picketing from operation of state law. In *McCulloch* v. *Sociedad Nacional de Marineros*, 372 U.S. 10 (1963), a companion case to *Incres*, the Court had held that the NLRB has no jurisdiction to order a representation election among the foreign crews of foreign-flag vessels.

In contrast, the Court in *International Longshoremen's Association, Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195 (1970), held that picketing directed at foreign-flag ships to protest substandard wages paid to nonunion American longshoremen servicing those ships in American ports arguably was protected by Section 7 of the NLRA, 29 U.S.C. 157, and thus not subject to the jurisdiction of the state courts. As the Court held, *Ariadne* differed from *Benz* and *Incres* in that the protest "threatened no interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law." 397 U.S. at 200.

In *Windward Shipping (London) Ltd.* v. *American Radio Association*, 415 U.S. 104 (1974), the Court again held that picketing of foreign ships to protest wages paid to foreign seamen was not activity "affecting commerce" within the meaning of the NLRA, even though American unions staged the picketing not to support the foreign crew, but to publicize the competitive advantage enjoyed by foreign ships over American shippers who employed American union members. The Court in *Windward* stated that the line of cases beginning with *Benz* did not "purport to fully delineate the threshold of interference with the maritime operations of foreign vessels which makes the [NLRA] inapplicable" (415 U.S. at 114). Because the pickets in *Windward* "[a]t the very least * * * must have hoped to exert sufficient pressure so that foreign vessels would be forced to raise their operating costs to levels comparable to American shippers," thus occasioning "more than a negligible impact on the 'maritime operations' of these foreign ships" (*ibid.*), the picketing was at root an attempt to interfere with the internal workings of a foreign vessel, the sort of activity to which the NLRA had already been held not to apply

in *Benz* and *Incres*. The state courts accordingly had jurisdiction to enjoin the picketing.

In *American Radio Association* v. *Mobile Steamship Association*, 419 U.S. 215 (1974), picketing identical to that involved in *Windward*, but at another port, had been enjoined by a state court in an action by American stevedoring companies seeking to service the foreign ships and American shippers wishing to load their cargoes on the ships. In this Court, the unions challenged the state court's jurisdiction to issue the injunction, distinguishing *Windward* as limited to the effects of the picketing on the foreign shipowners.[9] This Court refused to adopt this "bifurcated view of the effects of a single group of pickets at a single site" (419 U.S. at 222). The Court explained (*id.* at 224):

> While we * * * spoke in *Windward* of the effect of the Houston pickets on the maritime operations of foreign ships, the quoted passage [415 U.S. at 114] shows that we fully recognized that this effect would not be produced solely by the pickets and the messages carried by their signs. It would be produced in large part by the refusal of American workmen employed by domestic stevedoring companies to cross the picket line in order to load and unload cargo coming to or from the foreign ships. Since *Windward* held that the Houston picketing was not "in" or "affecting commerce," it would be wholly inconsistent to now hold, insofar as concerns Board jurisdiction over a complaint by respondents, that the employer of the longshoremen who honored the picket lines, or the shipper whose goods they did not handle, was "in" or "affecting commerce."

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[9] In *Windward*, the suit had been brought by the foreign shipowners. The unions in *Mobile* argued that *Windward* held only that the maritime operations of foreign ships were not "in commerce," and that insofar as picketing was directed at those ships it was beyond the Board's jurisdiction. They further argued that insofar as the picketing had effects on American neutral employers, who were themselves clearly "in commerce" and subject to the Board's jurisdiction, the picketing was arguably a secondary boycott prohibited by the NLRA and thus beyond the jurisdiction of the state courts (419 U.S. at 220).

The Court added (419 U.S. at 225; footnote omitted):

> The effect of the picketing on the operations of the stevedores and shippers, and thence on these maritime operations, is precisely the same whether it be complained of by the foreign-ship owners or by persons seeking to service and deal with the ships. The fact that the jurisdiction of the state courts in this case is invoked by stevedores and shippers does not convert into "commerce" activities which plainly were not such in *Windward*.

Petitioners interpret (Br. 8-23) the foregoing decisions, particularly *Mobile*, as establishing the principle that the Board is deprived of jurisdiction over all secondary boycotts in support of a primary dispute with a foreign entity which is beyond the Board's jurisdiction. See also *Baldovin* v. *International Longshoremen's Association*, 626 F.2d 445 (5th Cir. 1980). Since the Board does not have jurisdiction over the ILA's dispute with the USSR, it lacks power, they argue, to reach secondary activity directed at neutral American employers in furtherance of that dispute. The Board and the court below correctly concluded that this argument misreads the Court's prior decisions.

As the Board explained (S.M. 20a), "the Court analyzed the secondary effect of the *Mobile* picketing solely on the basis of its identity with the primary conduct held to be beyond the Board's jurisdiction in *Windward*." Thus, *Windward* and *Mobile* "holds only that, where primary activity interferes with foreign maritime relations and inextricably involves the secondary employers, the Board is prohibited from asserting jurisdiction over the primary conduct or its secondary effects" (S.M. 23a).[10] The Court did *not* hold that purely secondary activity which is directed immediately against domestic employers who are "in commerce" is beyond the Board's

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[10] Similarly, the court below read *Mobile* as establishing that in the case of interrelated labor disputes, particularly disputes that give rise to similar conduct carried out at a single site, a 'primary dispute' cannot be extricated from a 'secondary dispute' for purposes of contrary jurisdictional findings" (Pet. App. 13a).

jurisdiction simply because that conduct is undertaken in support of a primary dispute that is not "in commerce." Thus, the Court stated in *Mobile*, 419 U.S. at 225 n.10, that its decision therein "need cast no doubt on those cases which hold that the Board has jurisdiction under § 8(b)(4) of domestic secondary activities which are in commerce, even though the primary employer is located outside the United States. See *Madden* v. *Grain Elevator Workers Local 418*, 334 F.2d 1014 (CA7 1964), cert. denied, 379 U.S. 967 (1965); *Grain Elevator Workers Local 418* v. *NLRB*, 126 U.S. App. D.C. 219, 376 F.2d 774, cert. denied, 389 U.S. 932 (1967)."

Madden and *Grain Elevator Workers* both involved the same dispute. A Canadian union was engaged in a labor dispute with a Canadian shipper-employer. In support of that Canadian union, an American union that represented employees of the American secondary employer induced its members to cease loading the American employer's grain onto the Canadian ships. Both courts rejected the contention that the Board lacked jurisdiction over the secondary boycott. As the court said in *Madden*:

> No attempt is being made to regulate or to apply the Act to the "internal management or affairs" of [the Canadian employer]. * * * No conflict between American and Canadian policies can result from halting an illegal secondary boycott in this country, directed against an American employer by an American labor organization and involving employees working in a domestic plant of the American employer.

334 F.2d at 1019. Accord: *Grain Elevator Workers Local 418* v. *NLRB*, *supra*, 376 F.2d at 776.[11]

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[11] Petitioners' argument (Br. 22) that *Madden* and *Grain Elevator Workers* are distinguishable because there, "the Canadian union's * * * American activity was independent of the Canadian activity [so that] [i]t was capable of bifurcation and resolution without intrusion into the foreign dispute" ignores the fact that it was the American union's boycott of its domestic employer which was held to be within NLRA jurisdiction in those cases. Like the ILA's boycott here, the domestic, secondary boycott there was the

The court below also correctly concluded that "application of section 8(b)(4) here would portend no interference in the management or affairs of foreign companies, workers, or labor organizations" (Pet. App. 12a). It added (*id.* at 13a):

> [T]here is no attempt to "bifurcate" the effects of a single union action. The *only* labor-related activity in issue has been played out by an all-American cast. The fact that this domestic labor dispute was inspired by military events in foreign lands—events far beyond NLRB jurisdiction—does not counsel against application of the NLRA to the labor dispute ongoing here at home. * * *

Petitioners contend (Br. 13) that there was "no dispute between the union and the American entities that was independent of the [union's] dispute with the Soviets," and hence there was "no domestic activity which could be bifurcated from the foreign activity." Here, "as in *Mobile*, there was but a single union activity which had simultaneous domestic and foreign effects"; any "splitting off and resolution of the domestic effects, under the pretext of finding an independent American controversy, would necessarily resolve the dispute and end the activity which under the *Windward* analysis is conceded to be foreign" (Br. 23; see also *id.* at 17). This contention misconceives the basis for the *Windward* and *Mobile* decisions.

In *Windward* and *Mobile* the key factor was that the union's activity was beyond the Board's jurisdiction, and that fact precluded the Board from asserting jurisdiction over its secondary effects. The decisions do not turn on the union's having exerted economic pressure on foreign shipowners and American employers, in furtherance of the same foreign dispute. The union activity in *Windward* and *Mobile* consisted of primary picketing directed

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only conduct engaged in by the American union. Moreover, since the domestic union's boycott was undertaken in sympathy with the Canadian union's dispute with its Canadian employer, that boycott, like the one here, was exclusively in support of a foreign dispute.

at the employment conditions of foreign seamen on foreign ships, conduct outside the Board's jurisdiction. Although the same picketing affected domestic employers, this effect was merely an incident of the ship picketing which was beyond the Board's reach. Here, on the other hand, the union engaged exclusively in purely secondary activity against employers subject to the Board's jurisdiction. Since this is the only activity involved, there is no need, as there was in *Windward/Mobile*, to separate the domestic secondary effects from activity over which the Board lacked jurisdiction.[12] The Board can thus assert jurisdiction without interfering in foreign maritime operations, principles of comity, or international trade.[13]

Finally, the extension of NLRA jurisdiction over petitioners' activity effectuates the "fundamental congressional intent to formulate a uniform national labor policy not subject to varying and inconsistent state-by-state adjudications" (S.M. 8a). As the Board explained (*ibid.*; footnote omitted):

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[12] Since it is the nature and thrust of the union's activity, and not the character of the union's primary dispute, which determines whether the Board has jurisdiction over the activity, there is no valid basis for petitioners' assumption that, "if the ILA's dispute with the Soviets had been a 'labor' dispute, [rather than a political dispute,] bifurcation would not have been possible and the union activity would not have been subject to the LMRA" (Br. 18).

[13] *National Maritime Union (Shippers Stevedoring Co.)*, 245 N.L.R.B. 149 (1979), is consistent with this analysis. There, a union representing American seamen picketed a USSR flag ship with signs protesting the use of USSR vessels, instead of American ships with American crews, to transport foreign cargo purchased with US tax dollars. As the Board explained (S.M. 22a n.29), since "the picketing activity was directed immediately against the foreign flag ship with the intent of compelling the total replacement of the foreign ship and its foreign crew with an American ship and its American crew," it "*directly* intruded into the maritime operations of a foreign ship." Thus, under the *Windward/Mobile* limitation, the picketing was beyond the reach of the Act. Here, by contrast, the "alleged conduct is purely secondary and there is no risk that assertion of Board jurisdiction will directly intrude into the maritime operations of a foreign ship" (S.M. 23a).

The ILA's actions triggered a national boycott potentially affecting every port in the United States. The ILA can affect the USSR's stance on Afghanistan, if at all, only through an effective nationwide boycott of Russian cargo. A failure to assert jurisdiction would force charging parties into the various state courts, all of which have different injunctive statutes with different standards. Resort to the state courts may well lead to contradictory results, with the ILA being enjoined in some ports and not in others.

II. THE ILA BOYCOTT ACTIVITY WAS WITHIN THE SCOPE OF SECTION 8(b)(4)(B) OF THE NLRA, AND PROSCRIBED BY ITS TERMS

Section 8(b)(4) of the NLRA provides, in pertinent part, that it shall be an unfair labor practice for a union or its agents:

> (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in any industry affecting commerce to engage in, * * * a refusal in the course of his employment to use, * * * or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is:
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> * * * * *
>
> (B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person * * * *Provided*, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

These provisions implement the "dual congressional objectives of preserving the right of labor organizations to bring pressure to bear on offending employers in primary labor disputes and of shielding unoffending employers and others from pressures in controversies not their

own." *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951). See also *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 620-627 (1967); *NLRB* v. *Local 825, International Union of Operating Engineers*, 400 U.S. 297, 302-303 (1971).

In determining whether the Union is engaged in lawful primary, or unlawful secondary, activity, the "touchstone" is whether the union's concern is with the labor relations between the employer against whom its pressures are directed and that employer's own employees (protected "primary" activity), or whether the activity is "tactically calculated to satisfy union objectives elsewhere" (prohibited "secondary" activity). *National Woodwork, supra*, 386 U.S. at 644-645; *NLRB* v. *Enterprise Association & General Pipefitters, Local Union No. 638*, 429 U.S. 507, 511 (1977); *NLRB* v. *International Longshoremen's Association*, 447 U.S. 490, 503-504 (1980). Under this test, the ILA boycott activity is clearly secondary. As the Board observed (S.M. 14a; footnote omitted): "[T]he union's sole dispute is with the USSR over its invasion of Afghanistan. Allied, Waterman, and Clark have nothing to do with this dispute. Yet the Union's actions in furtherance of its disagreement with Soviet foreign policy have brought direct economic pressure on all three parties and have resulted in a substantial cessation of business."

A. The Unlawful Object Required For A Violation Of Section 8(b)(4)(B) Was Established

Petitioners contend (Br. 24-28) that both the Board and the court of appeals erred in finding that an object of ILA's refusal to handle Russian goods was to force one person to cease doing business with another person merely on the basis of the necessary effects of such refusal, when that refusal equally could be ascribed to a lawful object, *i.e.*, "a simple desire not to be involved in traffic with the Soviets" (Br. 25 n.29). There is no merit to this contention.

Petitioners suggest that direct evidence of their unlawful purpose to disrupt the business dealings between

neutral persons is required to establish a violation of Section 8(b)(4)(B) (Br. 24-26). That suggestion misinterprets the prohibition of Section 8(b)(4). That statute prohibits certain actions when "an object" of the action is to require a person to cease doing business with another. But the statute does not require a specific intent to accomplish the improper result. Here, as in *New York Mailers' Union No. 6*, 136 N.L.R.B. 196, 197-198 (1962), enforced as modified, 316 F.2d 371 (D.C. Cir. 1963) (quoting *Local 761, International Union of Electrical, Radio & Machine Workers* v. *NLRB*, 366 U.S. 667, 674 (1961); footnote omitted):

> [Petitioners] regard intent as synonymous with the *scienter* or *mens rea* of criminal violations. This is not, however, the type of intent which the Act requires to be proved. Rather, "in the absence of admissions by the Union of an illegal intent, the nature of the acts performed shows the intent.

Accord: *NLRB* v. *Retail Store Employees Union, Local 1001 (Safeco Title Insurance Co.)*, 447 U.S. 607, 614 (1980); *NLRB* v. *Building Service Employees International Union, Local No. 105*, 367 F.2d 227, 230 (10th Cir. 1966).[14]

Indeed, this Court's recent decision in *Retail Store Employees Union, supra*, makes it clear that, "at least when, as here, the union's conduct can under no reading of the facts be characterized as 'primary activity' protected by the Act" (Pet. App. 16a), the presence of an unlawful object may be inferred from the foreseeable and inevitable result of a union's conduct. In *Retail Store Employees Union*, a union engaged in an economic strike against an insurance company picketed and handbilled at the premises of title companies whose income was principally derived from the sale of the struck company's insurance. The picket signs and handbills clearly indi-

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[14] It is, of course, not necessary that the cessation of business be the *sole* object in order to be an object prohibited by Section 8(b)(4)(B). It is sufficient if it is *an* object. See *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 689-690 (1951).

cated that the union's dispute was exclusively with the insurance company, and that the union's appeal was to the public to cancel insurance with the struck employer. There was no independent evidence that an object of the union's conduct was to place secondary economic pressure on the title companies. However, because the title companies dealt almost exclusively in the struck employer's insurance, the Court agreed with the Board that the union's conduct was " 'reasonably calculated to induce customers not to patronize the neutral parties at all.' " 447 U.S. at 614. Holding the union "responsible for the 'foreseeable consequences' of its conduct," (*ibid.* n.9) the Court affirmed the Board's finding of a secondary boycott violation.

The Board, like the court of appeals (Pet. App. 18a), concluded that the rationale of *Retail Store Employees Union* "applies with full force to this case" (S.M. 32a). As the Board explained (S.M. 32a-34a):

> Approximately 85 percent of Allied's imported products, amounting to $25 million annually, come from the USSR. The boycott of Russian cargo inevitably would be expected to threaten Allied with substantial economic loss.
>
> It was equally foreseeable that no longshoremen could be employed by the neutral parties in the face of the ILA boycott. Clark regularly depends on the hiring halls operated by the ILA Locals to furnish the longshoremen who constitute its regular work force. * * *
>
> While the collective-bargaining agreements may have permitted the use of non-ILA employees, * * * ILA Vice President Hankard testified that * * * when the ILA goes on strike against a ship, scalawags do not substitute for striking ILA longshoremen. * * * "The Ship wouldn't be working."
>
> In these circumstances, the inevitable consequences of the ILA boycott, which [petitioners] had every reason to foresee with absolute clarity, were that Russian goods would not be moved by any employees in any of the ports encompassed by the boycott, that Waterman would cease carrying Russian cargo to the boycotted ports, and that Allied would be forced to

cease purchasing Russian wood for delivery to ports affected by the boycott. Under the rationale of [*Retail Store Employees Union*], [petitioners] must be held accountable for the foreseeable consequences of their conduct, and, regardless of their stated intent, must be held to have induced the boycott with an object of forcing the business entities involved to cease business operations among themselves and to cease handling goods of the USSR.[15]

B. The ILA's Boycott Is Subject To Regulation Under Section 8(b)(4)(B) Even Though It Was Not In Furtherance Of a Labor Dispute With Any Primary Employer and Sought a Political Rather Than An Economic Objective

The Board and the court of appeals also properly rejected petitioners' argument (Br. 28-31) that their boycott was not regulated by Section 8(b)(4)(B) because it was not in support of a labor dispute with any primary employer and sought a political rather than an economic objective. Section 8(b)(4)(B) prohibits certain specified conduct if engaged in with certain specified objectives. The language of the provision does not condition the invocation of its protections upon the existence of a primary labor dispute.

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[15] Petitioners' assertion (Br. 27) that their "refusal to handle [Allied's USSR cargo] inevitably affected [only] Clark," and that Waterman "could have continued" to transport Allied's cargoes to Canadian ports where petitioners' boycott was not in effect, does not undermine the analysis set forth above. Initially, it is sufficient to establish a violation of Section 8(b)(4)(B) that, as petitioners acknowledge, the boycott "inevitably affected Clark" in its ability to do business with Waterman. With respect to Allied and Waterman, it is settled that Section 8(b)(4)(B) does not require a total cessation of business; it is enough that the union's conduct requires either a change in an employer's policies or causes a significant diminution in trade. *NLRB* v. *Local 825, International Union of Operating Engineers*, 400 U.S. 297, 304-305 (1971). See also *NLRB* v. *Carpenters District Council of New Orleans & Vicinity*, 407 F.2d 804, 806 (5th Cir. 1969); *Bedding, Curtain & Drapery Workers Union, Local 140*, 164 N.L.R.B. 271, 272 (1967), enforced, 390 F.2d 495, 499-501 (2d Cir.), cert. denied, 392 U.S. 905 (1968).

Moreover, as the Board observed (S.M. 13a), "[i]t is plain from the legislative history that the secondary boycott provisions [of the Act] are to be construed broadly." Thus, during congressional consideration of the 1947 amendments to the Act, the evil of secondary boycotts was recognized as being that

> they do not arise out of any dispute between an employer and employees who engage in the activities, or, in most cases, between the employer and any of his employees. More often than not the employers are powerless to comply with demands giving rise to the activities, and many times they and their employees as well are the helpless victims of quarrels that do not concern them at all. * * *

H.R. Rep. No. 245, 80th Cong., 1st Sess. 23 (1947), I NLRB, *Legislative History of the Labor Management Relations Act, 1947*, at 314 (1948) (hereinafter cited as *"Leg. Hist. LMRA"*). As Senator Taft explained during a debate with Senator Pepper, the objective of Section 8(b)(4)(A) (now Section 8(b)(4)(B)) was to "make[] it unlawful [for a union] to resort to a secondary boycott to injure the business of a third person who is wholly unconcerned in the disagreement" 93 Cong. Rec. 4198 (1947), II *Leg. Hist. LMRA* 1106. When Senator Pepper objected that the language of the section was too broad, applying "not only to the so-called typical secondary boycott, but to any kind of a boycott," Senator Taft responded (*ibid.*):

> It has been set forth that there are good secondary boycotts and bad secondary boycotts. Our committee heard evidence for weeks and never succeeded in having anyone tell us any difference between different kinds of secondary boycotts. So we have so broadened the provision dealing with secondary boycotts as to make them an unfair labor practice.

Accordingly, in *National Woodwork, supra*, this Court held that if a "boycott [is] tactically calculated to satisfy union objectives elsewhere" it is secondary, and "[t]here need not be an actual dispute with the [primary] em-

ployer * * * for the activity to fall within this category," 386 U.S. at 644-645. This principle has been applied by the courts in a variety of situations where, as here, the union has no primary labor dispute with any employer. For example, in *NLRB* v. *Washington-Oregon Shingle Weavers' District Council*, 211 F.2d 149 (9th Cir. 1954), a union ordered employees of an employer not to process shingles into shakes because it had been attempting to organize the Canadian mills that manufacture such shingles. The union admittedly had no dispute with the specific mill that was manufacturing the shingles. The court stated (*id.* at 152; emphasis added):

> The Union's argument that there was no evidence of a dispute between it and the Canadian plants is without merit. If that were true, it would not make the Union's conduct any more excusable. The prohibited object of the boycott is stated by the statute to be "forcing * * * any employer or other person to cease using * * * the products of any other producer, processor, or manufacturer * * *." That is a prohibited object whether the union has or has not a dispute with such "other producer, processor, or manufacturer." *In fact, if the object is sought, not because of any dispute, but merely because the union dislikes the other producer for any reason, or for no reason, the conduct would appear even more reprehensible.*[16]

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[16] Accord: *National Maritime Union* v. *NLRB*, 342 F.2d 538, 541-542 (2d Cir.), cert. denied, 382 U.S. 835 (1965); *National Maritime Union* v. *NLRB*, 346 F.2d 411, 416-420 (D.C. Cir.), cert. denied, 382 U.S. 840 (1965); *NLRB* v. *Twin City Carpenters District Council*, 422 F.2d 309, 312-313 (8th Cir. 1970). As the District of Columbia Circuit recently reaffirmed, "the Board [is] under no obligation to pause at the threshold to identify a conventional labor dispute. * * * [It need only] measure the union's conduct against specific provisions of the Act defining unfair labor practices." *Soft Drink Workers Union, Local 812* v. *NLRB*, 105 L.R.R.M. 2658, 2662 (1980).

Of the five courts of appeals that have considered the issue, only the Fourth Circuit has found a primary labor dispute necessary to the finding of a violation of Section 8(b)(4)(B) of the Act. *NLRB* v. *International Longshoremen's Association & Local*

In this case, Section 8(b)(4)(B)'s purpose of protecting commerce by "shielding unoffending employers and others from pressures in controversies not their own" (*Denver Building & Construction Trades Council, supra*, 341 U.S. at 692) would be furthered by finding the ILA boycott within the scope of that provision. As the court of appeals explained (Pet. App. 19a):

> The ILA concedes it has no dispute with Clark, Waterman or Allied, and there is no suggestion that it seeks to affect the labor relations of any of these employers. It is also plain that these "unoffending employers" have been embroiled in a "controversy not their own" as a result of union action which "reasonably could be expected" to "threaten a neutral party with ruin or substantial loss." * * *

Conversely, the court observed that the countervailing interest in protecting the "right of labor organizations to bring pressure to bear on offending employers in primary labor disputes" (*Denver Building & Construction Trades Council, supra*, 341 U.S. at 692) would not be furthered by finding the boycott beyond the scope of Section 8(b)(4), because "it [is] plain that the ILA was not engaged in primary activity and that the boycott against Allied's goods was 'calculated to satisfy union objectives elsewhere'" (Pet. App. 19a).

Finally, the court correctly concluded (Pet. App. 21a) that nothing in the "language of section 8(b)(4) and the congressional objectives that prompted its enactment point to [any] reason why the section should not prohibit * * * secondary pressure, for whatever reasons motivated," including that "motivated by a 'purely political dispute.'" Indeed, the court noted, "[w]e think it more rather than less objectionable that a national labor union has chosen to marshal against neutral parties the considerable powers derived by its locals and itself under

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1855, ILA (Ocean Shipping Service), 332 F.2d 992 (4th Cir. 1964). For the reasons set forth above, we submit that the view of the Fourth Circuit is erroneous.

the federal labor laws in aid of a random political objective far removed from what has traditionally been thought to be the realm of legitimate union activity" (*ibid.*).[17] See, *e.g.*, *Eastex, Inc.* v. *NLRB*, 437 U.S. 556, 563-570 (1978). Indeed, by seeking to govern the conduct of third persons to accomplish a political objective (to force them to cease doing business with the USSR), petitioners undertook to exert extra-governmental regulatory power of a sort that only properly authorized governmental institutions may exercise. Cf. *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457, 465 (1941).

Nor does the conclusion that Section 8(b)(4)(B) prohibits union secondary boycott activity in furtherance of a political objective infringe on the right of expression of the union and its members (cf. *NLRB* v. *International Longshoremen's Association*, *supra*, 322 F.2d at 997). As the court below pointed out (Pet. App. 22a-23a; footnote omitted), "the union and its members have numerous alternative forms of 'expression' left to them, including the right to assemble or leaflet in protest of Russian aggression and the right to petition and lobby elected representatives in pursuit of a reassessment of United States foreign policy regarding American-Russian trade".[18]

In sum, while the ILA's boycott of Russian goods may be, as petitioners contend (Br. 26, 34, 37-42), political

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[17] Although the ILA's boycott of Russian goods is in furtherance of a political objective rather than a primary labor dispute, petitioners err in suggesting that their action has "nothing to do with labor relations" (Br. 29). The ILA implemented its boycott by causing employees of a neutral employer, Clark, who were ILA members, to cease handling and unloading goods owned by Allied and transported by Waterman. At the very least, this strike disrupted labor-management relations between Clark and its employees, and, when it forced Allied, Waterman, and Clark to cease doing business with each other, it resulted in the very disruption to interstate commerce that the NLRA was intended to avoid. There was a labor dispute, albeit a purely secondary one.

[18] The Board added that the union and its members could have "picketed the Russian embassy and Russian consular offices in various cities throughout the United States" (S.M. 34a n.45).

and "conscientious," Section 8(b)(4) of the NLRA prohibits the means petitioners chose to express their disapproval of aggression by a foreign government. It is settled that "the legality of the ultimate goal 'does not insulate the union's actions where * * * such ultimate object is sought by prohibited means. A finding of an illegal intermediate object is all that is required.'" *National Maritime Union* v. *NLRB*, *supra*, 346 F.2d at 419-420. Accord, *Soft Drink Workers Union, Local 812* v. *NLRB*, *supra*, 105 L.R.R.M. at 2665; *NLRB* v. *United Association of Plumbers, Local No. 12*, 320 F.2d 250, 254 (1st Cir. 1963).[19]

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[19] The government's position that petitioners' action amounted to a secondary boycott violative of Section 8(b)(4)(B) of the NLRA is consistent with its position in *Jacksonville Bulk Terminals* v. *International Longshoremen's Association*, No. 80-1045. There, the government contends that the question whether the refusal of the ILA members to handle Russian goods violated the no strike clause of the collective bargaining agreement with their employer presents a "labor dispute" within the meaning of Section 4 of the Norris-LaGuardia Act, 29 U.S.C. 104. Nonetheless, federal jurisdiction to enjoin the strike exists under *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U.S. 235 (1970), and *Buffalo Forge Co.* v. *United Steelworkers*, 428 U.S. 397 (1976), because disputes over work assignments are subject to the mandatory grievance and arbitration clause of the collective bargaining agreement. The Norris-LaGuardia Act defines a "labor dispute" in terms identical to those in Section 2(9) of the NLRA, 29 U.S.C. 152(9). It encompasses not only traditional primary disputes, but also those with secondary objectives. (See Brief for the United States as Amicus Curiae, No. 80-1045, at 11-19; see also *Soft Drink Workers Union, Local 812, supra*, 105 L.R.R.M. at 2662-2663). That activity in support of such secondary objectives violates Section 8(b)(4) of the NLRA, and that it occurs in the absence of a primary labor dispute, does not affect the determination that it involves a labor dispute. In other words, a labor dispute in which the union pursues an unlawful objective or employs unlawful means is nonetheless a "labor dispute" within the meaning of Norris-LaGuardia and the NLRA.

The government states in *Jacksonville Bulk Terminals* that the question whether the ILA had a contractual right to object to handling politically offensive cargo was an arbitrable issue under the collective agreement there involved (Amicus Br. 22-23); it also states that a union conceivably could negotiate a contractual right

III. THE ILA ACTIVITY WAS NOT PRIVILEGED BY THE FIRST AMENDMENT

Petitioners contend (Br. 37-43) that their refusal to handle Russian goods was privileged by the First Amendment because it was merely an expression of the conscience of the individual union members, who were demonstrating disapproval of Soviet aggression. The Board (S.M. 30a n.38) and the court of appeals (Pet. App. 22a-24a) properly rejected this contention.

The facts establish conclusively that Gleason's January 9 public statement ordering an immediate suspension in handling Russian ships and cargo (*supra*, pages 2-3) was not merely a response to overwhelming demands by the union members, but rather "a binding order from the president of the ILA to the rank-and-file membership" (S.M. 29a).[20] "The orchestration of the boycott by the International's leadership" is further evident in the conversations between Allied officials and representatives of the Local Unions on March 12 and 25 (*supra*, page 4), "which indicated that any change in the boycott of Russian cargo would originate with ILA President Gleason" (S.M. 29a). This "uncontroverted evidence demon-

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to refuse work assignments on conscientious grounds (Amicus Br. 26 n.17). It does not follow, as petitioners assume (Br. 31), that an arbitrator could properly hold that any such contract provision privileges the union to engage in a secondary boycott violative of the NLRA. Cf. *NLRB* v. *Iron Workers*, 434 U.S. 335, 351 (1978) ("That a court has jurisdiction to consider a suit on a particular contract does not suggest that the contract is enforceable"); *NLRB* v. *Enterprise Association & General Pipefitters, Local Union No. 638*, *supra*, 429 U.S. at 519 ("[A] valid contract does not immunize conduct otherwise violative of § 8(b)(4)").

[20] The Board noted that, shortly before the public release of Gleason's statement, some ILA longshoremen employed by Clark wanted to stop unloading the WALTON because of the presence of Russian cargo, but were directed by ILA Vice-President Hankard "to continue working until he found out from ILA headquarters in New York 'what was happening'"; none of the "ILA rank and file in Boston actually stopped handling Russian cargo until ordered to do so by Gleason" (S.M. 29a).

strates that the decision to boycott Russian cargo was made by ILA leadership and was maintained in effect as a matter of ILA policy determined at the headquarters level" (S.M. 30a).[21]

Where, as here, a union sponsors and publicly announces its refusal to handle "hot cargo" and then effectuates that secondary boycott by actively refusing to permit its members to perform that work for their employers, it does more than merely disseminate information or express the union's or its members' political, social or religious views. Rather, by exercising the full economic power of an organized group of workers held together by union discipline, the union, itself, engages in a refusal to perform work or handle goods, induces its members to withhold their services from their employer, and coerces and restrains the employer who relies on the union for its labor supply. The regulation of such inherently coercive conduct raises no First Amendment problem. See *Denver Building & Construction Trades Council, supra*, 341 U.S. at 690-691; *Local 74, United Brotherhood of Carpenters* v. *NLRB*, 341 U.S. 707, 713 (1951); *Giboney* v. *Empire Storage Co.*, 336 U.S. 490 (1949). See also *United States* v. *O'Brien*, 391 U.S. 367 (1968). Indeed, as the court of appeals observed, "the sort of union-directed work stoppage at issue here is much farther removed from 'pure' expression than the peaceful picketing that has been found to violate section 8(b)(4) in numerous cases" (Pet. App. 23a; footnote omitted; see also *id.* at 36a-37a (concurring and dissenting opinion)). See, *e.g.*, *Retail Store Employees Union*,

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[21] Since the material facts set forth in the affidavits submitted to the district court (J.A. 24a-64a) were not disputed and were sufficient to establish that petitioners had engaged in activity violative of Section 8(b)(4) of the NLRA, there is no merit to petitioners' contention (Br. 43-45) that the court of appeals should not have summarily reversed the district court, but instead should have remanded the case for an evidentiary hearing. Moreover, petitioners were afforded a full evidentiary hearing before the Board and adduced essentially the same evidence that they presented to the district court.

Local 1001, supra, 447 U.S. at 616; *International Brotherhood of Electrical Workers* v. *NLRB*, 341 U.S. 694, 705 (1951).

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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